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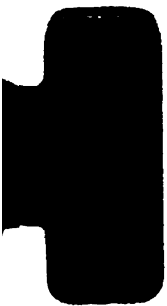
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# REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

# SUPREME COURT

OF THE

TERRITORY OF DAKOTA,

FROM ITS ORGANIZATION TO AND INCLUDING THE  
DECEMBER TERM, 1877.

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BY GRANVILLE G. BENNETT,  
*Associate Justice Supreme Court.*

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*VOL. I.*

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YANKTON, DAKOTA :  
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1879.

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## JUDGES AND OFFICERS OF THE SUPREME COURT

DURING THE PERIOD COVERED BY THESE REPORTS.

### CHIEF JUSTICES.

PHILEMON BLISS. *Appointed from Ohio.*

From March 27, 1861, to February 23, 1865.

ARA BARTLETT. *Appointed from Dakota.*

From February 23, 1865, to April 6, 1869.

GEO. W. FRENCH. *Appointed from Maine.*

From April 6, 1869, to March 17, 1873.

PETER C. SHANNON. *Appointed from Penn'a.*

Appointed March 17, 1873. Re-appointed April 19, 1877.

### ASSOCIATE JUSTICES.

JOSEPH L. WILLIAMS. *Appointed from Tennessee.*

From July 22, 1861 to February 23, 1865.

GEO. P. WILLISTON. *Appointed from Pennsylvania.*

From March 27, 1861 to June 22, 1864.

WILLIAM E. GLEASON. *Appointed from Dakota.*

Successor to Joseph L. Williams. From February 23, 1865 to —.

JOHN W. BOYLE. *Appointed from Dakota.*

Successor to Wm. E. Gleason, (resigned.) From January 26, 1867.

ARA BARTLETT. *Appointed from Illinois.*

Successor to Geo. P. Williston. From June 22, 1864, to February 23, 1865

JEFFERSON P. KIDDER. *Appointed from Minnesota.*

Successor to Ara Bartlett. From February 23, 1865, to February 24, 1875.

WILMOT W. BROOKINGS. *Appointed from Dakota*

Successor to John W. Boyle. From April 19, 1869, to March 24, 1873.

ALANSON H. BARNES. *Appointed from Wisconsin.*

Successor to Wilmot W. Brookings. Appointed March 24, 1873; reappointed April 23, 1877.

GRANVILLE G. BENNETT. *Appointed from Iowa.*

Successor to Jefferson P. Kidder. Appointed February 24, 1875.

### UNITED STATES ATTORNEYS.

HENRY M. VALE. *Appointed from New York.*

March 27, 1861. (Declined.)

WM. E. GLEASON. *Appointed from Maryland.*

From May 9, 1861, to May 22, 1865.

JAMES CHRISTIAN. *Appointed from Kansas.*

From May 22, 1865, to August 30, 1865. (Resigned.)

GEO. H. HAND. *Appointed from Dakota.*

From May 4, 1866, to June 1, 1869.

## JUDGES AND OFFICERS.

- WARREN COWLES. *Appointed from Pennsylvania.*  
From December 22, 1869, to August 23, 1872. (Died.)
- WILLIAM POUND. *Appointed from Dakota.*  
From December 19, 1872, to October 24, 1877. (Died )
- HUGH J. CAMPBELL *Appointed from Louisiana.*  
Appointed November 19, 1877.

## UNITED STATES MARSHALS.

- WILLIAM F. SHAFFER. *Appointed from ————.*  
From March 27, 1861, to July 12, 1862. (Resigned.)
- GEO. M. PINNEY. *Appointed from Dakota.*  
From July 12, 1862, to February, 1865.
- LABAN H. LITCHFIELD. *Appointed from Dakota.*  
From February 23, 1865, to September 27, 1872. (Died )
- JAMES H. BURDICK. *Appointed from Dakota.*  
From December, 19, 1872, to —,
- JOHN B. RAYMOND. *Appointed from Mississippi.*  
Appointed July 12, 1877.

## CLERKS OF THE SUPREME COURT.

- M. K. ARMSTRONG,  
From July 6, 1865, to December 4, 1866.
- JAMES S. FOSTER,  
From December 4, 1866, to December 4, 1867.
- GEORGE N. PROPPER,  
From December 4, 1867, to January 18, 1870.
- J. R. HANSON,  
From January 18, 1870, to June 25, 1873.
- GEORGE I. FOSTER,  
From June 25, 1873, to January 29, 1875.
- B. S. WILLIAMS,  
Appointed January 29, 1875.

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DECEMBER TERM, 1867.

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PRESENT :

HON. ARA BARTLETT, CHIEF JUSTICE.

HON. JEFFERSON P. KIDDER, }  
HON. JOHN W. BOYLE, } ASSOCIATE JUSTICES.

UNITED STATES V. STEAM BOAT CORA.\*

1. *LIBEL*: FILING: SEIZURE UNDER. The libel must aver a seizure of the boat by an officer named in the statute\* for that purpose, before the same is filed.
2. *BOND*: RECEIVING PROPERTY UNDER: WAIVER. The claimant waived no right in regard to the defense set up by receiving the property on bond. To give the court jurisdiction the statute must be strictly followed.

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\*This is the first written opinion delivered by the Supreme Court of this Territory.  
REPORTER.

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United States vs. Steam Boat Cora.

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*Appeal from Yankton County District Court.*

THIS action is on the admiralty side of the U. S. Court. The District Court, Second Judicial District, June Term, 1867, BARTLETT, C. J., presiding, dismissed the complaint (libel) on the ground that the same did not show a seizure of the boat, by a proper officer, before it was filed. To which decision, the plaintiff excepted, and took an appeal to this court.

The facts are sufficiently stated in the opinion.

*Geo. H. Hand*, U. S. Attorney, for appellant.

Applying for and receiving property on bond is such an acknowledgment of the jurisdiction of the court, as the claimant is not at liberty to controvert. (Conklin's Practice, 554.)

*Wm. L. Joy*, for appellee.

The grounds of jurisdiction must be stated in the libel. (Conklin's Treatise, 343 and 33.) Plaintiff must allege what it is necessary to prove to maintain his action. (Conklin's Treatise, 349.) The fact of seizure is one of the necessary averments in the libel. (Conklin's Treatise, 33; and see also form of libel, 516.) There must have been a valid subsisting seizure at the time the libel was filed, for upon this the jurisdiction of the court depends. (Conklin's Treatise, 457; *The Ann*, 9 Cranch, 289; also same case, 3 Curtis' U. S. Reports, 356; Conklin's Treatise, 353 and 547. See *Lessee of Lanning v. Dolph*, 354, Conklin's Treatise.) The seizure after the libel filed conferred no jurisdiction. (*Brig Ann*, 3 Curtis' U. S. Reports, 356.) The United States courts are courts of limited jurisdiction and can only exercise their powers in the mode prescribed by the statute. (Conklin's Treatise, 355.) The libel must show that the seizure was made by some person authorized to make the same by the statute under which this action is brought, and that it was made upon the grounds designated in the act and at the place where the offense was committed; and as none of these facts

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United States vs. Steam Boat Cora.

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are averred in the libel, there is nothing showing that the court had jurisdiction. Conceding that the court had no jurisdiction by virtue of the seizure, it is contended by the plaintiff that the giving of the delivery bond conferred jurisdiction. The bond takes the place of the thing seized; if the seizure is valid the bond is good; all that is waived by giving the bond is any irregularity in the execution of the process. (2 Conklin's Admiralty Practice, 102; *Brig Ann*, 3 Curtis' U. S. Reports, 356.)

KIDDER, J.—The original libel in this action was filed against the steamboat Cora, commanded by one W. R. Massly, then being upon and navigating the waters of the Missouri river, in this Territory, for introducing into the Indian country spirituous and intoxicating liquors.

At the October term of said court, in 1866, on motion, the plaintiff had leave to amend the original libel, for reasons not herein important to state, which was accordingly done; and when the action finally came on to be heard, the defendant moved to dismiss it for want of jurisdiction in the district court, for the reason that the amended libel did not show a seizure of the boat before the libel was filed.

The original libel was filed on the 14th day of July, 1866, which does not set forth a seizure of the boat in any manner. The amended libel states "that on the 17th day of July, A. D. 1866," the "Marshal of the United States, for the said District of Dakota Territory, did seize the said steamboat Cora," etc.

The only question presented by the bill of exceptions is: Did the court below err in dismissing the action for want of jurisdiction in that court, because the complaint (libel) did not show a seizure of the boat by the proper authorities for a violation of the United States laws before the libel was filed?

I. It is necessary to maintain this action, that the libel should show a valid and existing seizure of the boat, and that that seizure was made by the "Superintendent of Indian Affairs, Indian Agent, or sub-agent, or commanding officer of a military post." (13 Stat. at Large, 29.)

## United States vs. Steam Boat Cora.

The seizure should be made by some one of the above named officers in order to make it a *legal* seizure under the United States statute; and the libel should allege that the seizure was made by such an officer.

The original libel was clearly defective as it did not allege that there had been a seizure made by any person; therefore, the necessity of an amendment.

Now as to the amended libel: It shows and alleges a seizure made by the marshal of the territory, only, (and this was three days after the filing of the original complaint) and not by any one of the officers named in the act who are empowered with any authority to make such seizure.

This seizure of the marshal was after the commencement of the action, and he took it under and pursuant to a writ of the court *based* upon the original complaint. The seizure of the marshal under this writ is not a *real* and *legal* seizure of the boat by virtue of the act of congress before referred to. The jurisdiction of United States courts is limited, and these courts can only exercise such powers as are prescribed by statute. (Conklins' Treatise, 355.)

There must have been a valid and existing seizure by one of the officers mentioned in the statute when the original complaint was filed, before the government can sustain this action. (Conklin's Treatise, 343, 349, 457; and cases there cited.)

II. It was claimed in argument, that as the defendant filed a bond to retake the property after it was seized, that he could not afterwards controvert the jurisdiction of the court in the premises; but, although this question is not properly before us in the record, we are of opinion that the giving of the bond does not waive any right in regard to the defense set up to the *merits* in the action, but would, perhaps, be a waiver to irregularities in the execution of the process. (2 Conklin's Admiralty Practice, 102; *Brig Ann*, 3 Curtis S. C. Reports, 356; and cases there cited.)

We see no error in the record. The judgment of the court below is, therefore,

AFFIRMED.



## Bruguier vs. the United States.

## BRUGUIER V. THE UNITED STATES.

1 5  
1 199  
46\* 502  
46\* 602

1. **INTOXICATING LIQUORS: SALE TO INDIANS: MISDEMEANOR.** The selling or giving spirituous liquors to an Indian under the charge of an Indian Agent, by under the Statutes of the United States is a misdemeanor—not a felony.
2. ———: **INDICTMENT: SUFFICIENCY.** Two counts in an indictment, one for giving away and the other for selling spirituous liquors, do not render it bad for the reason that the jury return a general verdict of guilty.
3. ———: **MATERIAL ALLEGATIONS: PROOF.** Every allegation that is essential must be proved as laid, unless stated under a *videlicet*; the office of which is to mark that the party does not undertake to prove the precise circumstances alleged.
4. ———: ———: ———. The allegation of time, place, quantity, quality, kind, and value, when not descriptive of the identity of the subject of the action, will be found immaterial, and may not be proved strictly as alleged. It is sufficient if the proof agree with the allegation in its substance and general character, without precise conformity in every particular.
5. ———: ———: ———. An indictment describing a thing by its general term, is supported by proof of a species which is clearly comprehended within such description. If the indictment charges that the defendant sold, to-wit: one pint of whisky, it is sustained, if it be proved that he sold or gave to the Indian spirituous liquors.

*Writ of Error to Yankton County District Court.*

THIS case comes to this court by petition in error under our statute of 1862.

The indictment was for selling and giving spirituous liquors to an Indian, in two counts. Trial by jury, October term, 1867, Second Judicial District, BARTLETT, C. J., presiding.

It charged in one count that the defendant wrongfully and unlawfully gave, and in the other that he unlawfully and wrongfully sold to a "certain Indian Chief, commonly known by the English name of the *Man that was struck by the Ree*, and whose Indian name is *Pa-la-ne-a-pa-pe*, \* \* \* and being then and there under the charge of an Indian Agent," etc., "a quantity of spirituous and intoxicating liquors, to-wit: one pint of whisky." But it did not charge that the act was done feloniously.

On the trial, the plaintiff offered to introduce as a witness *Pa-la-ne-a-pa-pe*, an Indian. The defendant objected to his

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Bruguier vs. the United States.

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testifying upon the ground that he was an *Indian*. The court overruled the objection, and he testified.

The defendant requested the court to charge the jury, that the "government must prove either the giving or selling of whisky, as stated in the indictment, or the jury must find a verdict of not guilty," which the court refused to do, but did instruct them, among other things, that "if the defendant \* \* \* gave or sold to the said Strike-the-Ree any whisky or spirituous liquors, knowing it to be such, then the defendant is guilty and the jury must so find." He further instructed them that proof of the selling, or giving of wine, gin, whisky, or brandy, or any spirituous liquor to the Indian mentioned by the defendant is sufficient to support the indictment." Exceptions by the defendant were taken to the said ruling and charge of the court.

The jury returned a general verdict of guilty. The defendant moved in arrest of judgment on the grounds that the indictment did not charge the defendant with having committed the act with a felonious intent; and that the verdict be set aside and a new trial granted, because there was a general verdict of guilty on the two counts in the indictment. The court overruled both motions. Exceptions by the defendant.

There were other questions raised on the trial and are in the record, but these mentioned before are the only ones relied upon by the defendant in argument.

*William Tripp*, for plaintiff in error,

Cited 30 Maine, 29; 7 do., 132; Stark. on Evidence, 1530-1-2; *State v. Godfrey*, Fairfield's (Me.) R., 361; Eastman's Dig., (Me.) R., 385, paragraphs 7, 8, 9 and 10; Wharton on Cr. Law, 196, 73, 74, 996, 1037; Greenleaf's Ev. 134, 135, § 65; 24 Arkansas R., 620.

*George H. Hand*, U. S. Attorney, for defendant in error.

Jurisdiction on ceded lands (4 Wallace, *United States v. Halliday*, 407.) What is a felony? (1 Arch. Cr. Prac., 2:) offenses under § 21, P. O. Act, 1825, not felonies; (Bright. Dig.,

## Bruguier vs. the United States.

216, § 80;) public officers acting as such; (Greenleaf, §§ 83, 92.) Proving the sale of intoxicating liquors is sufficient under the indictment without specifying any particular kind in proof. (Wharton's Cr. Law, 1st Vol., 622.) General verdict on two counts is good. (Am. Cr. Law, Vol. 1, 422; *People v. Austin*, Parker's Cr. Reports, 154.)

KIDDER, J.—The statute upon which the indictment in this case was drawn, is as follows: "Every person, except an Indian in the Indian country, who sells, exchanges, gives, barter, or disposes of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or agent," etc., "shall be punishable," etc. 4 U. S. Stat. at Large, 564; *vide* also Stat. of June 30, 1834, § 70 and the 13 U. S. Stat. at Large, 29.

I. Is the offense a felony? If so, the judgment of the court below ought to have been arrested, because the act of selling should have been charged in the indictment to have been done feloniously.

The term felony appears to have been long used to signify the degree or class of crime committed, rather than the final consequence of its commission. In cases where the statute declares that the offender shall be deemed to have feloniously committed the act, it makes the offense a felony. The statute under which this prosecution is commenced does not use this phrase.

Offenses under the 21st section of the Postoffice Act of the United States, of 1825, for detaining, embezzling, stealing letters or remittances, (wherein the punishment is much more severe than in the case at bar,) are not felonies. See opinion of the Supreme Court in the case of the *United States v. Lancaster*.\* The cutting of timber on government lands has always been considered a misdemeanor.

Originally the word felony had a meaning well defined, but it has become vague and undefined, being controlled entirely by the statutes of different states. Acts of parliament and

\*5 Wheat., 434; *United States v. Mills*, 7 Peters, 430.

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Bruguier vs. the United States.

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statutes of states, by their peculiar phraseology, make certain offenses felonies which were not so by the common law. In America, statutes define the distinction, and as it seems to us clear that the statute herein quoted does not make the offense alleged in the indictment a felony, the court properly refused to arrest the judgment.

II. For that the indictment contained two counts, and the jury returned a general verdict of guilty, the defendant below claimed that judgment should be arrested and he have a new trial. There is no principle in law better settled than that when an indictment contains more than one count, and one of them is good, and a general verdict has been rendered, the court will not arrest the judgment, but will proceed to sentence the defendant on a good count. American Crim. Law, 422, and cases there cited; 12 Vermont, *State v. Davidson*, 300. In the 22 Vermont, *State v. Bugbee*, 32, in a prosecution for selling spirituous liquor without a license, analagous to this, wherein there were more than one count and some of them bad, the court say: "The court in such case do not arrest the sentence, but proceed to sentence on the good counts alone." There is, however, no pretense in this case but that both counts were good, saving the question herein decided as to the word felony; and it is, therefore, safe to conclude that the court committed no error in not arresting the judgment for this reason.

III. Was an Indian a competent witness in this case? No authorities have been presented to the court on either side in this regard, and, therefore, the argument on the side of the prosecution upon this point, has taken the ground that no distinction should be made in this Territory so far as color or race is concerned, and *vice versa* on the other. It seems to us that there should not be any distinction made so far as color or race is concerned, and it would indeed be very unwholesome for us, in this age of constitutional reform, when we are endeavoring to establish principles in consonance with the intelligence of the time in which we live to consider ourselves obliged *in rigore juris* to arrive at any other conclusion. Every person should have equal rights under the law. But referring to the 13 U. S. Statutes at Large, 351 and 533, and

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 Bruguier vs. the United States.
 

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12 do. 588, we find this language employed: "In the courts of the United States no witness shall be excluded in any action on account of color." \* \* \* "In all other respects, the laws of the state in which the court is held shall be the rules of decision as to the competency of witnesses in the courts of the United States in trial at common law, and in equity and admiralty."\* In connection with this federal statute let us construe that of Dakota, (*vide* Stat., 1862, p. 99, § 308) wherein we find this language: "Every human being of sufficient capacity to understand the obligations of an oath, is a competent witness in all cases, both civil and criminal." It is plain and certain then that Pa-la-ne-a-pa-pe was a competent witness in this case, and was properly admitted to testify therein, if he was a "human being," which we have not the prerogative to deny; and most certainly, there being no evidence in the case, so far as the record shows, touching this point, it would be seemingly very improper for us, on our own motion, to settle the question here by judicial determination against his humanity.

IV. The pleader having used, in the indictment, the words, "to-wit: one pint of whisky," was the prosecution bound to prove it to be the article named? The statute first quoted is, any person who shall give or sell to any Indian \* \* \* "any spirituous liquors or wine," shall be liable. Must it be proved as alleged? Does it come within the well known rule of being descriptive of the offense, and under the class that must be proved?

Generally, every allegation that is essential, in whatever form it may be stated, must be proved. There is, however, a middle class of circumstances not essential in their nature, which may become so by being inseparably connected with the material allegations. These must be proved as they are laid unless they are stated under a *videlicet*; the office of which is to mark that the party does not undertake to prove the precise circumstances alleged; and in such cases he is ordinarily not holden to prove them. A *videlicet* will not avoid a variance, or dispense with exact proof in an allegation of material matter. The allegations of time, place, quantity,

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Bruguier vs. the United States.

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quality, kind and value, when not descriptive of the identity of the subject of the action, will be found immaterial, and may not be proved strictly as alleged. It is sufficient if the proof agree with the allegation in its substance and general character without precise conformity in every particular. An indictment describing a thing by its generic term, is supported by proof of a species which is clearly comprehended within such description. Thus: if the charge be of poisoning by a certain drug, and the proof be of poisoning by another drug, it is sufficient; or, if the charge be of a felonious assault with staff and the proof be of such an assault with a stone; 1 Greenleaf, (sixth edition) 80 to 97, and notes are authorities sufficient upon this point and are (generally) all in favor of this position herein laid down.

In cases where there are two words or phrases, as in this case—"spirituous liquor" and "whisky"—the broader includes the latter.

The statute does not use the word "whisky," but whisky is spirituous liquor; proof, then, of the giving or selling of "spirituous liquor," the word being controlled by a *videlicet*, whatever the allegation in the indictment might be—whether rum, gin, brandy or whisky, or any other thing which is spirituous liquor, the allegation would be sustained and the proof should be regarded as competent to sustain such charge in the indictment. 1 Whar. Crim. Law, 622; and cases there cited.

No errors appearing in the record, the judgment of the court below is

**AFFIRMED.**

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\*Since this decision was pronounced, a Statute of the United States has been passed, whereby all persons can "give evidence" and shall enjoy the benefits of all laws *a la* white citizens within the jurisdiction of the United States Revised Statutes of the U. S., 348, § 1977.

REPORTER.

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Waldron vs. Evans.

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## WALDRON V. EVANS.

1. **VENUE: CHANGE OF: DISCRETION.** The county to which an action should be sent, on a motion for a change of venue under the Statute of 1862, is in the discretion of the court; *vide* 58, § 51.
2. **WRIT OF ERROR: MOTION FOR A NEW TRIAL.** It is not necessary to lay a foundation to bring a case into this court, that a motion for a new trial should be made in the court below.
3. **CONTRACT: VALIDITY: MUTUALITY.** To make a contract valid the minds of the parties thereto should meet.
4. **OFFICER: PATRONAGE: CONSIDERATION FOR BESTOWAL.** An official who has patronage to bestow, should not be influenced in its bestowment by any pecuniary consideration.
5. **EVIDENCE: BOOKS: HOW INTRODUCED.** Books of parties may be corroborative as evidence, or not, but the effect is left to the jury from inspection in connection with other evidence in the case. A party is not bound to introduce his book; the opposite party may introduce it, at any rate if there be no objections.
6. **ADMISSIONS: COMPETENT EVIDENCE: WEIGHT.** An admission of a party is evidence against him according to its terms and the circumstances under which it is made; but it is not the best evidence. The best evidence is what *actually* transpired between the parties.

*Writ of Error to Clay County District Court.*

It appears that two actions were commenced by the defendant in error in the District Court, in the Second Judicial District, against the plaintiff in error, and by stipulation they were consolidated. A jury trial was had therein, October term, 1866, BARTLETT, C. J., presiding. The defendant in error recovered a verdict. The verdict was set aside and a new trial granted. The plaintiff in error moved to change the place of trial, and desired to have it sent to Bon Homme county. The court ordered it sent to the county of Clay, to which decision of the court, he excepted.

The petition of the plaintiff below set out a long account against the defendant, which had been running several years, amounting to several hundred dollars.

The answer of the defendant claimed that there was a settlement between the parties in September, 1865, of all matters in controversy, and there was then found due from him to the

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plaintiff seventy-eight dollars and fifty cents, provided the plaintiff should complete and finish up defendant's house, which was then in an unfinished condition, which he never did do. He also claimed a set off, and a large balance due him.

The plaintiff in reply denied all which.

During the time that a portion of the accounts of the plaintiff below was accruing against the defendant, he was Provost Marshal in this Territory, and in their business matters in controversy in this action, was a certain special contract, about which there was testimony, *pro* and *con*, which tended to prove, that if the defendant would appoint the plaintiff his clerk, he might charge him, in their deal, a certain sum of money, which was agreed upon between the parties, which he did charge.

A trial by jury was had' in Clay county, First Judicial District, June term, 1867, KIDDER, J., presiding.

The defendant below moved the court to dismiss the action for want of jurisdiction in the court to try the same, because the court in the Second Judicial District had no right by law or otherwise to send the case to Clay county, and that it should have been sent to Bon Homme county; the court house in the latter being nearer the one in Yankton, than is the court house in the former county.

The court *pro forma* overruled the motion to dismiss. To which decision, the defendant excepted.

Testimony was introduced, a part of which is hereinbefore detailed, when the court, among other things not excepted to, charged the jury, upon the requests of the plaintiff, as follows:

1. If the jury find from the evidence that a contract was entered into between the parties, which was made while the parties were under a mutual mistake as to material facts affecting its subject matter, the plaintiff understanding that he was to do chores and furnish cows for his board and washing, and the defendant understanding that he was to do carpenter work in addition, then the contract is invalid and may be avoided by either party in a court of law, and plaintiff may recover the value of his labor.



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2. If the jury find from the evidence that a contract was entered into between the parties, by which the plaintiff was to do chores and carpenter work and furnish cows in consideration of his board and washing, and the jury further find from the evidence that the appointment of Deputy Provost Marshal or clerk to the Provost Marshal, constituted any part of the consideration of said contract, then they will treat such contract as absolutely void, and the plaintiff will not be precluded from recovering the value of his labor. .

3. If the jury find from the evidence that a contract was entered into between the parties, by which the plaintiff was to do chores and carpenter work and furnish cows in consideration of his board and washing, and the jury further find from the evidence that a change made by defendant in appointing plaintiff clerk to Provost Marshal at Yankton, instead of Deputy Provost Marshal at Vermillion or Bon Homme, constituted any part of the consideration of said contract, then they will treat such contract as absolutely void, and the plaintiff will not be precluded from recovering the value of his labor.

ADDITIONAL REQUESTS OF THE PLAINTIFF.

1. If the jury believe from the evidence that at the settlement in February, 1865, and 2d September, 1865, the settlement had reference to the cash accounts alone (so called) and did not embrace or include the carpenter work, and that on such settlement on the 2d September of the cash account, there was found a balance due Evans of \$79.10, or \$78.50, and the carpenter work was not included and has not been paid for, then the plaintiff would be entitled to pay for said carpenters, and in addition thereto said agreed balance of \$79.10 together with interest on the same.

2. If the jury believe from the evidence that the plaintiff kept a fair book accounts of the work on the buildings, and the cash account, and has produced that book in evidence before you,—this fact of the plaintiff's production of his book of account is evidence strongly corroborative of his testimony; and on the other hand, if Mr. Waldron kept no book account or has not produced any book of such fact, of Waldron's not

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producing a book of accounts weakens Waldron's testimony.

3. The rule is that admissions are the weakest kind of evidence, as being liable to be misunderstood or misstated.

All of which were objected to by defendant's attorney, for the following reasons:

As to the *first* request, it is correct, so far as it goes; but the court desires to add: that to make a contract valid, the minds of the parties thereto should meet. Now, if you should find that the parties did not agree in relation to what the plaintiff should do for the defendant, and what the defendant should do in payment therefor, there was no binding contract made, and the parties can each recover of the other in this action, for the items charged, in connection with the supposed contract, such sum as each reasonably deserves to receive for the same, as you may find from a fair balance of the testimony in relation to each of said items.

As to the *second* and *third* requests: The court stated to the jury that such is the law—that the disposing of offices in this manner is against sound policy—that the man who has it in his power to bestow official patronage, should do so without being influenced by any pecuniary consideration; and the court further charged them, that if they should find the contract void, neither party would be precluded from recovering of the other party, as he had before stated to them in relation to the first request.

As to the additional requests of the plaintiff: As to the *first* the court charged, it is correct so far as it goes, but in addition he said to them if you find, as there is testimony tending to prove that the carpenter work was settled, and so understood by both parties, then it could not be recovered in this action, and the plaintiff will start anew on the balance of \$79.10, or \$78.50, or on such balance as the parties agreed upon was due under the settlement of September 2d, 1865, which you will consider, and such other items as may have been omitted by mistake, or kept open by mutual agreement of the parties for further consideration.

As to the *second*: The court charged that books of parties may be strongly corroborative of the testimony of the party—

if it is a fair book and kept in a manner that shows reliability on its face; but, if not kept in a fair manner, it would not corroborate the testimony of the party introducing it, but might have a tendency to discredit it. The effect of it, as evidence, is strictly a matter with you from its inspection and from the consideration of the evidence in the case in relation to its correctness.

A party is not bound to introduce his book. He may, or may not. If he does not, it is an act of the party which you are at liberty to consider unfavorable to him, if the facts and circumstances connected with the transaction are such as would justify you in so doing. In the present case, the book was offered to the plaintiff by the defendant to be put into the case as evidence by the former, if he desired to employ it for that purpose.

As to the *third*, the court charged: that an admission of a party is evidence against him, according to its terms. You will consider when and where the admission was made, and the cause of it; and did the witnesses, who have sworn to the admission, state all he said on the occasion? The weight of it is with you to determine its effect in connection with all the circumstances bearing upon it.

The admission of the plaintiff, as a matter of law, is not the best evidence in this case. What the parties actually did, and what occurred between the parties on the settlement, connected with the admissions, is the best evidence as to that point.

To the foregoing charge of the court, on the plaintiff's "requests" and "additional requests," the defendant excepted.

Defendant excepts at the time to the ruling of His Honor Judge Kidder, for allowing plaintiff to introduce testimony tending to impeach, contradict or discredit the book of defendant, which plaintiff introduced under the following circumstances:

Defendant placed said book in the hand of witness G. P. Waldron, by permission of the court, to refresh recollection of witness in relation to the entry of two settlements therein alleged to have taken place between the parties on the 13th

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day of February and 2d day of September, 1865, respectively, and for no other purpose. Said book was not read or shown to the jury by defendant. At another stage of the trial plaintiff offered defendant said book as evidence to the jury on his part, the book being tendered the plaintiff by the defendant for that purpose, and then called James W. Evans, witness in the case, and offered to prove and introduced his testimony tending to show that defendant had made, since the last trial of this cause, a false entry of a settlement, to-wit: of September 2d, 1865. To which defendant excepted, because the testimony would tend to impeach the book which the plaintiff himself had introduced as testimony on his part.

The witness (Evans) testified that "this entry was not exhibited on the trial;" he had "no recollection of any such entry." "I did not see it (entry) on the other trial. I took the book into my hand." Entry from Waldron's book: "Settled this day with J. W. Evans all matters to date, except board from the 9th of June, 1865, and find due him \$78.50. Sept. 2, 1865."

Ruling excepted to upon the part of defendant.

The jury returned a verdict for the plaintiff.

This action comes here by petition in error.

The defendant in error moves to dismiss the action hence, for the reason that in the court below, the plaintiff in error did not make a motion for a new trial.

*Spink and Hand and C. H. Brackett*, for the defendant in error.

*William Tripp*, for the plaintiff in error.

The court, after argument, overruled the motion to dismiss, and the case, on its merits, was elaborately argued by the counsel on both sides.

The opinion of the court was delivered by BARTLETT, C. J. The judgment of the court below was

AFFIRMED.\*

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\*We cannot find, on file or elsewhere, any written opinion of the court, nor briefs of counsel.

REPORTER.

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## JANUARY TERM, 1872.

## PRESENT:

HON. GEORGE W. FRENCH, CHIEF JUSTICE.

HON. JEFFERSON P. KIDDER,	} ASSOCIATE JUSTICES.
HON. WILMOT W. BROOKINGS,	

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 CAMPBELL V. CASE.

1. **PLEADINGS: MOTION: EFFECT OF.** When a motion to set aside the affidavit and requisition in an action of replevin has been made and sustained, with leave to the party to amend, the proceedings are concluded, and the case ended, so far as a general judgment is concerned, unless the amendment is made pursuant to the order of the court.
2. **STATUTES: REPEAL BY IMPLICATION: RULE GOVERNING.** Whether a new law, by implication, supersedes an old one upon the same subject, cannot well be determined, in most cases, by any merely *a priori* rules of argument or construction, but must depend very much upon the peculiar circumstances of each case,—the old and the new law—the mischief and the remedy.
3. ———: ———: ———. A subsequent statute revising the whole subject matter of a former one, and evidently intended as a substitute for it, must operate to repeal the former, although it contains no words to that effect.

*Appeal from Yankton County District Court.*

This action was brought for the recovery of the possession of certain personal property, taken from plaintiff under a warrant of attachment.

The facts necessary to an intelligent understanding of the points decided are stated in the opinion.

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*Bartlett Tripp*, for appellant.

Goods *custodia legis* cannot be replevied, nor can *defendant* in *attachment* try the validity of proceedings in another action. (Wait's Annotated Code, 411 d.; id., 371, f. i.; id., 373; id., 374, § 208; 7. Abb. Dig., 572; 1. Abb. Dig., 568; § 80; id., 129, § 2; 2 Bl. Com., 141, n. i.; Bacon's Abridgment, Titles "Replevin;" Allen on Sheriffs, 271-2 and 276; 3 U. S. Dig., 335, § 8; id., 337, § 61; id., 338, § 78; id., 338, § 81; 3 Wait's Dig., 1632, § 9, g.; 2 Hill. on Torts, 244, n.; 2 Hill. on Torts, 231, and see note 22 Wis., 646; 7 Barb., 650; Simmon's Dig., 717, § 5; 21 Iowa, 535; Drake on Attach't, § 251.) Neither yoke of said cattle were, by law, exempt from attachment; but if so exempt, plaintiff waived such right by his acts, and his neglect to claim it. (Drake on Attach't, § 195; 20 U. S. Digest, 910, § 78; 1 Wait's Dig., 724, § 136; id., 725, § 141; *Howard v. Tarr*, 18 N. H., 457; 2 Hill. on Torts, 240, note; id., 242, § 31, and cases there cited; Broom's Legal Maxims, 785; Wait's Annotated Code, 553, m.; 34 N. Y., 253; 34 Me., 233; 22 Cal., 506-7.) There must have been a demand or refusal before a right of action accrued to this plaintiff, and such demand must have been alleged before it could be proven on the trial of the issues. (7 Maine, 502; 38 Cal., 507; 2 Hill. on Torts, 229, § 12; 1 Abb. Dig., 569, § 92.) This plaintiff waived all irregularities not raised in his motion, as defendant in attachment; or if the irregularity of the officer's proceeding in attachment, sought to be raised on the trial of replevin, was included in said motion to set aside, it is as adjudicated, and he is bound by order of the court therein, until reversed on appeal. (6 Abb. Dig., 387, §§ 26-27; 2 Wait's Dig., 1585, §§ 45-17; 1 Smith & Tiffany's Prac., 423-4 and 431-2; Ibid, 437-8.) The replevin process had been set aside when judgment was rendered for plaintiff, so that if judgment could have been rendered at all for plaintiff, it could only have been for damages, and not for possession of the cattle. (2 U. S. Dig., 174, § 418; 1 Smith & Tiffany's Prac., 437-8; 8 U. S. Dig., 182, § 176.) The officer's acts are presumed to be legal, and the levy valid, until the contrary be shown, and any act required by the

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statute will be presumed to have been done in absence of such statement in the officer's return. Less strictness held in personalty than realty—still less in *attachment* than in *transfer of title* under execution. (Eastman's Dig., 307; 2 Hill. on Torts, 206, n.; 2 Abb. Dig., 615, §§ 200, 199, 203-6-7-8; 2 Abb. Dig., 601, §§ 3 and 4; Drake on Attach't, § 209; 11 Cal., 238; 8 Me., 408; 11 Barb., 520; 31 Me., 546-50; 14 Mass., 404-7-8.) Any irregularity of the officer in making his attachment, is never matter of abatement, and can be taken advantage of by this plaintiff, by motion only. It cannot be raised in the trial on the merits, as presented by the pleadings in the case. (2 Wait's Dig., 1571, § 4244; 38 Cal., 372; Wait's Annotated Code, 340 d., 413 d; 6 Abb. Dig., 64, § 40; Gould's Pleadings, 268, § 135; 1 Chitty's Pleadings, 450, n. 3; 11 Mass., 271; 38 Me., 388; 8 U. S. Dig., 177, § 56.) If the plaintiff has any cause of action against defendant, it is trespass, not replevin. (2 Hill on Torts, 1978; 3 U. S. Dig, 541, § 278; 3 U. S. Dig., 539.) Plaintiff in replevin cannot have attachment discharged, as to a part of his property, and retained as to remainder. (Wait's An. Code, 417.) If it can be made to appear that the officer did not make any appraisement, or return an inventory, in accordance with the statute of 1862, such omission is at most a mere irregularity, and does not affect the validity of the attachment. The statute of 1862 is directory, only, and a failure to comply therewith would not affect the subsequent *transfer of title* under *execution*, much less the *levy of attachment*, in which *seizure* and *possession* are the only purpose of the process. (*Hunt v. Loucks*, 38 Cal., 372; *Blood v. Light*, id., 649; *Tuttle v. Gates*, 24 Me., 395, (11 Shep.); 4 U. S. Dig., 773, §§ 899. 90-1-2, 964-9 and 50; Drake on Attach't, § 208; 1 Abb. Dig., 317, § 149; Wait's An. Code, 547; Purchaser's Title, notes e. f.; Cites, 5 Barb., 565, 568-9; Wait's An. Code, 357, § 184, a.; 8 Me., 408; 20 U. S. Dig., 910, § 78; 9 U. S. Dig., 219, § 62.)

*Moody & Hand*, for appellee.

The defendant, who is the appellant in this court, received the oxen in controversy, as a deputy sheriff of Yankton

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county, turned over to him by one J. D. Flick, another deputy sheriff of the same county. The said J. D. Flick, deputy sheriff, undertook to levy the attachment, but did not comply with the statute requisites in making such levy. (Laws, 1867-8, 54, § 185, and laws, 1862, 77, § 195.) Therefore, the said Flick was a trespasser when he took the possession of the oxen, and his successor, the defendant, was in no better condition. Summary process, attachments and the like must be executed strictly according to the provisions of the law authorizing them, else the officer executing them becomes a trespasser *ab initio* and of course the owner can maintain replevin against him, as well. (6 Wheaton, 119; Drake on Attachments, § 194; 28 N. Y., 659; 4 Minn., 242; 1 Nevada, 27 and 82, etc.; 35 Ills., 417.) No demand is necessary where the defendant comes wrongfully into the possession of the property. (4 Nevada, 494; 20 Wis., 462; 3 Nevada, 557; 46 Ills., 320.) In this case the record shows, conclusively, that there was a demand and refusal, even if it is held necessary. The decision of the court upon this question of fact is conclusive, as the record does not show, that all the evidence is before this court. One yoke of said oxen was exempt by statute. See laws, 1865-6, page —. And there being evidence to show that the oxen in controversy was all the oxen plaintiff had when the attachment was sought to be levied, it was the duty of the officer to set off, to the plaintiff, then defendant, one yoke, although this is an immaterial question, inasmuch as the officer acquired no title or right to the possession of any of the property seized, in consequence of having failed to make the seizure as the law directed. The issuing or granting of a warrant of attachment is a judicial act, and not ministerial. It having been made in this case by the clerk, instead of by the judge or court, is absolutely void, and the officer could not justify under it. (6 Minn., 183; Drake on Attachments, § 88; Nash's Pl., 407 to 409.)

KIDDER, J.—This action was tried by the court, the parties having waived a trial by jury. The case shows, that the



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plaintiff, on the 26th day of June, 1871, was the owner of fourteen oxen; that on said day, one Flick, a deputy sheriff of Yankton county, took possession of said oxen under a warrant of attachment in a suit of Bramble & Miner against this plaintiff. Flick subsequently resigned his said office and ceased to act as deputy sheriff, and, previous to the commencement of this action, turned over the oxen to this defendant, who was also a deputy sheriff of the same county.

On the 27th day of July the plaintiff commenced these proceedings—called replevin—to recover the possession of said oxen, and, thereon, took them out of the possession of the defendant.

At a special term of the court, holden on the 4th day of September, the defendant moved to set aside the affidavit of the plaintiff and the requisition thereon, which motion the court sustained and set aside all the proceedings, but with leave to the plaintiff to file an amended undertaking and affidavit within eight days.

After this, we find nothing in the record in relation to the proceedings, *i. e.*, the affidavit, undertaking or any preliminary paper in the case. This judgment of the court concluded the proceedings and ended the case, so far as a general judgment is concerned, unless the papers were amended as they were permitted to have been done by the court. 2 U. S. Dig., 174, § 418; *Foster v. Atkinson*, 1 Litt., 214; 8 U. S. Dig., 182, § 176; *Clements v. Elliot*, 11 Ala., R. 360.

But, as the case went to a hearing on the merits, without objection, so far as the record shows, we have concluded to examine its merits on another question:

The court, among other facts, found that the officer, Flick, who made the attachment, "did not in the presence of two residents of the county, or in the presence of any person, attach said property, nor did he make any appraisalment of said property, nor any inventory of the same as specially required by statute; that said oxen were all the oxen that said Campbell owned or possessed; that said oxen were turned out to the defendant in this action, a deputy sheriff of

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Yankton county, about twelve days before this action was commenced, and that the plaintiff has received damages to the amount of seventy-five dollars for the detention of said oxen."

And his conclusions of law were, that "one yoke of said oxen were exempt from attachment under the exemption law; that the seizure of said property by said Flick," etc., "as shown by his return of the warrant in the case of *Bramble & Miner v. C. T. Campbell*" (plaintiff) "was in violation of law, and wholly void; that the plaintiff is entitled to the possession of the oxen described in the complaint, and seventy-five dollars, his damages, for the unlawful detention of the same." And judgment was rendered accordingly.

It appears from the foregoing "facts" and "conclusions," that the opinion of the court was predicated upon the fact that the statute of 1862, of this territory, was not repealed by that of 1867-8; consequently, the officer, in making the attachment, not acting pursuant thereto, was a trespasser *ab initio*, and his proceedings thereon were *void*.

Whether the statute of 1862 in this regard is repealed, is a question of great practical utility in our territory, and, therefore, we have examined this question with as much care as the subject merits.

"Whether a new law, by implication, supersedes an old one upon the same subject cannot well be determined, in most cases, by any merely *a priori* rules of argument, or construction, but must depend very much upon the peculiar circumstances of each case,—the old and the new law—the mischief and the remedy." But it is sound law, we think, and no authorities can be found that will controvert it, that a subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, must operate to repeal the former, although it contains no words to that effect. *Giddings v Cox*, 31 Vt. R., 607; *Mason v. Waite*, 1 Pick., 452; 12 Mass., *Bartlett v. King*, 537, 545, and cases there cited; *Goddard v. Boston*, 20 Pick., 407, 410, and cases there cited. These authorities and many others we might

cite are in point on the question of repeal by *implication*. In the case at bar, it will be entirely unnecessary to refer to such cases, for the language of the statute is, (Stat. of 1867-8, 117, § 378): "All statutory provisions *inconsistent* with this act are hereby repealed," etc.

The statute of 1862, page 77, Sec. 195, is: "The order of attachment shall be executed by the sheriff without delay. He shall go to the place where the defendant's property may be found, and there in the presence of two residents of the county," etc.

The statute of 1867-8, pages 54, 55, Secs. 195, 188, is substantially like the one of 1862, except it drops the language: "He shall go to the place where the defendant's property may be found, and there in the presence of two residents of the county," etc.

Passing the question of repeal by implication, is the former statute inconsistent with the latter?

It is evident that the legislature intended to abolish all Common Law actions and proceedings, and all distinction between equitable and legal remedies, and to repeal all former remedial statutes; but being fearful that the Code of 1867-8, might not provide a full remedy for all wrongs, out of the abundance of their caution, *provided* that former statutes not inconsistent with the Code and the Common Law practice, might be adopted so far as may be necessary to prevent a failure of justice. Page, 117, §§ 378-9.

It seems to us, that if this statute furnishes a full, complete and ample remedy for the enforcement of the plaintiff's rights, and also for the protection of the defendant's, then its provisions *govern* and *repeal* all former statutes on the same subject.

We will examine this Statute of 1867-8, for the purpose of ascertaining whether it provides a remedy by which the plaintiff can enforce his rights, and one by which the defendant can protect his.

The object of an attachment law is to enable the creditor to seize and hold the property of his debtor, which is subject to

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such a process, so as to make it certain that he will have something with which to liquidate the judgment, if he should ultimately recover one.

Chapter 4, page 52, on the subject of attachment, fully protects in its provisions the rights of a defendant in preliminary, as well as final, proceedings; an affidavit must be made—security must be given on obtaining a warrant. The sheriff must attach the property and *safely* keep it, etc.

Sections 185, 188, pages 54, 55, give full protection to the rights of both parties. The sheriff is required to make and return an inventory of the property attached, to keep the property seized by him, or the proceeds of such as shall have been sold, to answer any judgment which may be obtained; and shall, subject to the direction of the court, collect and receive all debts, etc., for the purpose of protecting the respective interests of the parties.

The defendant may always know what property—personal—of his has been attached, for the officer will dispossess him of such as he can take into his possession, and such as is incapable of manual delivery he can attach by leaving a certified copy of the warrant of attachment with him, with a notice showing the property levied on.

And *all* persons may know what property has been attached, either personal or real, as the officer is required to make and return an inventory, by examining the same on file in the office of the clerk of the court. And *lis pendens* being necessary to be filed in the office of the register of deeds, in the county where the real property attached is situated, notice thereof is thereby given to all.

This statute, in our opinion, protects *as fully* the interests of the parties as the prior one, and is not so complicated. It also seems to be a revision of the whole subject-matter, and was evidently intended as a substitute for it; it is not, therefore, necessary to resort to the prior one in order to do complete and ample justice to, and protect the rights of, not only the parties in an action, but of all persons who may have any interest therein; we have, therefore, come to the conclusion

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that the Statute of 1867-8 repeals that of 1862, and the officer in making the attachment was not bound to follow it. It follows then that the conclusions of law, so far as the seizure of the oxen by the officer was concerned, was in "violation of law and wholly void;" that the plaintiff was entitled to the possession of the same, and that he recover damages for their detention, were erroneous.

The judgment of the court below is, therefore, *reversed* and the cause remanded.

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JANUARY TERM, 1874.

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PRESENT:

HON. PETER C. SHANNON, CHIEF JUSTICE.

HON. JEFFERSON P. KIDDER, }  
 HON. ALANSON H. BARNES, } ASSOCIATE JUSTICES.

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FRALEY V. BENTLEY, ET AL.

1. **MISJOINDER OF ACTIONS:** OBJECTION, HOW TAKEN. Objections on the ground of misjoinder of actions, should be taken by demurrer, motion to strike out, or motion to compel plaintiff to elect upon which cause of action he would proceed.
2. ———: ———: **WAIVER OF OBJECTIONS.** The objection is waived by taking issue upon plaintiff's petition, and such waiver extends to all defects in the first pleading, except such as are of a jurisdictional character, and that the complaint or petition does not state facts sufficient to constitute a cause of action
3. ———: ———: **STIPULATION BY WAIVER.** Such waiver is to be taken as a stipulation or agreement that defendant is content with the plaintiff's pleadings, and takes issue upon them as presented.
4. **EVIDENCE: DEPOSITIONS.** Defendant, by waiving objections to the blending of equitable and legal proceedings in one action, thereby consents that evidence may be received in any of the modes applicable, and the cause may be heard on depositions.

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5. *DEED: CONSIDERATION.* The recitals in a deed as to the consideration, are not conclusive, but the true and actual consideration may be shown by proof *aliunde*.
6. *CONTRACT: BREACH: MEASURE OF DAMAGES.* F sold and conveyed to A and B, a certain parcel or tract of timber land, for the consideration of four hundred dollars expressed in the deed, and the further consideration of one hundred dollars to be paid in lumber; and that the said A and B would erect on said land, within a certain stated time, a good steam saw-mill. A and B failed to erect the mill as stipulated. *Held:* That the benefit to be derived by F was the difference between the price actually paid, and the value of the land, that being the amount paid by F for the promise of A and B to erect the mill.

*Appeal from Yankton County District Court.*

THE first pleading on part of plaintiff purports to be a petition for specific performance and damages. The petitioner alleges, that on or about the 4th day of November, 1865, he sold and conveyed to defendants a certain tract of timber land, for the consideration of \$400, cash down; and, further, that defendants were thereafter, to-wit: in the spring of 1866, to erect and have completed on said land a steam saw-mill, and deliver to plaintiff good sawed lumber to the amount in value of \$100—"making in lumber and money \$500, and the erection and construction and completion of said steam saw-mill. These, altogether united, constituted the consideration for the sale of said tract of timber land, united likewise with the further consideration and fact which formed a large and controlling inducement in the sale and disposition of said tract of land, that petitioner then owned 160 acres of land and a number of town lots in the immediate vicinity of said tract so sold, the value of which would have been greatly enhanced in value by the erection and completion of said mill."

Defendants failed and refused to erect the mill, or to furnish the lumber as stipulated, and plaintiff prays a decree for specific performance of said contract, and for \$500 damages. A supplemental petition was filed, asking that a writ of injunction issue, restraining defendants from cutting timber on said land, which was allowed.

Defendants answering admit the purchase of the land, and the execution of the deed, a copy of which they set out, allege that the only consideration for the same was \$400 as expressed

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in the deed, and that was all that was ever agreed to be paid.

They further allege that plaintiff received from Walter A. Burleigh, improvements, in the town of Bon Homme, of the value of \$100 as a further consideration for the sale of said land to defendants. And they "expressly deny all matters set up in plaintiff's petition and supplemental petition, except what is admitted."

The cause was tried to the court on depositions, and a judgment rendered in favor of plaintiff for the sum of \$500 and costs. From this judgment, defendants appeal.

*Moody & Hand*, for appellants.

Neither the petition nor the proofs in this case, show any cause of action against the defendants below, (the plaintiffs in error here.) The petition and amended petition set out a contract by defendants, to erect upon their own land, a steam saw-mill. *Not to erect and maintain one.*

The proofs show that the contract, if one was made, was a verbal one, and was a part of the contract to sell and convey the lands to defendants by the plaintiff, and was a condition of such sale. Such contract, if one existed, was merged in the deed, and parol proof thereof was wholly incompetent and improper.

This is in no sense like a case, where a different consideration from that expressed in the deed, was paid or agreed to be paid, and is allowed to be shown by parol proof, for the effect of this alleged agreement was to limit the use of the property conveyed, or a portion of it, to a particular purpose, thus changing the deed, from one absolute upon its face, to one with a condition annexed. This cannot be done by parole proof. (18 Michigan, 354; 3 Nevada, 120, 132; Hilliard, Real Prop., Vol. 1, 77, 348, 353, note; Kent's Com., Vol. 4, 144, 125 side page, and 143 note C.; Willard's Eq., 286; Starkie's Evidence, 1002, etc.; 2 Hilliard, Real Prop., 275, etc., 228, § 30; 46 Ills., 297 and 163, and 250; 1 Greenleaf, § 275, etc.; 2 Kernan, 561; 6 Smith, 39.) The action was one upon the equity side of the court strictly, to enforce a specific performance of

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an alleged agreement concerning lands. At least such it was at the commencement, but the judgment seems to have been rendered upon the law side for damages for breach of contract. As the case was commenced and carried through, defendants were not entitled to a jury, but as it resulted from the finding of the court, they were so entitled; and thus by means out of their power, they were deprived of even a chance to demand a jury. (11 Wallace, 610.) A court of equity will sometimes decree compensation, (never damages, strictly speaking,) when it is incident to the relief prayed for and granted—as when a defendant, since the commencement of proceedings, has put it out of his power to comply with the order of the court, but jurisdiction must have been first acquired by the court of equity, rightfully.

In this case the petition and amended petition, and the proofs, show conclusively that it is no case for equitable relief, and, therefore, just as conclusively no case where compensation or damages could be awarded. Specific performance will not be decreed when the contract is not certain, and definite in its terms. (Willard's Eq., 266 to 268; Story's Eq. Im., 729 and 731, Par. 767-769; Story's Eq. Im., 724, Par. 764; 4 Wallace, 513; 25 Texas, 408; 19 Wisconsin, 99; Parsons' Cont., 2 Vol, 513.) There is nothing to show, either in the allegations or the proof, what kind of a mill was to be erected; whether to cost one thousand or fifty thousand dollars; whether it was to saw one foot or fifty thousand feet of lumber per day, or in fact that it was to be maintained one hour, or to saw one foot of lumber, thus rendering it impossible for the court to make any decree for its erection, for what one man might deem a good mill would cost one sum, and what another man would deem a good mill would cost a much larger sum.

Courts of equity never interfere to relieve parties from such uncertain contracts. In other words, they do not undertake to make contracts for parties, only to enforce them when they are certain, definite, and not successfully disputed.

Again: The plaintiff in his amended petition, alleges it to be out of defendant's power to comply with this contract,



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when he alleges their insolvency, and courts of equity will not decree an impossibility. If, as claimed by plaintiff's counsel, the contract to erect the mill was independent of the conveyance, and not merged in it, then it is concerning lands, and, therefore, void by the Statute of Frauds, and such statute need not be pleaded when the defendants deny the agreement, as in this case. (Hilliard on Vendors, 123, § 39; 25 New York, 153.) The right to a vendor's lien is claimed as though that would give a court of equity jurisdiction, seemingly with the purpose of avoiding a jury trial, but that has been effectually disposed of by the finding of the court; or, if not, the rule is too well settled for argument, that such right cannot exist when the action is upon contract like this, and the damages unliquidated.

The party should first seek his remedy upon his contract, in a court of law, where the defendants have a right to a jury trial, and then if judgment be obtained, there may, under the proper state of facts, be some ground for enforcing a vendor's lien. (4 Kansas, 76; 3 Kansas, 172.) The damages alleged and testified to, were merely visionary and speculative, and not such as a court can recognize. They were as to what profits plaintiff would have realized if a mill had been erected; not what he lost, because it was not erected; not that it changed the market value of any single article of his property; nor that the want of it put him to any extra expense; nor, indeed, is there any proof that he was to have the right to buy one foot of lumber, and the absurd and flimsy proof that some town lots of his, six or seven miles away, and a homestead that he had forfeited, would, in the opinion of the witnesses, be enhanced in value, is not such proof as courts base their judgments upon. (32 Missouri, 275; 23 Howard, 487; 28 New York, 72; 4 Barb., 261; 3 Barb., 424; Parsons on Cont., Vol. 2, 459, etc., and notes; 48 Ills., 308; 45 Ills., 206; 20 Wisconsin, 262 and 297; 21 Wisconsin, 439; 16 New York, 489.) By the finding of the court, as indicated in its judgment for damages only, the defendants were entitled to a trial by jury; and when the conclusion was reached denying the plaintiff a specific execution of the contract or other equi-

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table relief, the court should have dismissed the petition or sent the issues to a jury for trial. (6 Wallace, 134; 45 Ills., 350; 42 Ills., 471; 40 Ills., 182-3; Willard's Eq., 308, etc.) It cannot be claimed that a jury trial was waived, for such was not the fact, as shown by the record, and the only mode of such waiver is pointed out by the code. (Code of 1862, p. 93, § 276 ) As the case stood upon the pleadings and was tried, it was not proper even to demand a jury trial. (Code of 1862, p. 90, §§ 260 and 261.) When the court found only damages were recoverable, which was strictly and only within the province of a court of law, it should have sent the issues to a jury for trial on its own motion. Else a plaintiff has only to allege something which, uncontradicted, would show a right to equitable relief, though having no foundation in point of fact, to deprive a defendant in every case of his constitutional right of trial by jury. (35 Ills., 375; 33 Ills., 227; 43 Ills., 280; 6 Nevada, 145.) This case having been tried by the court below, upon written evidence alone, and such evidence being in the record, and all before this court, this court will look into such evidence (it being an equitable case upon the pleadings,) to ascertain if the court below has arrived at a correct conclusion upon the facts as well as upon the law, and will try the case upon the record as it stands, and no exceptions were necessary or in fact proper. (42 Missouri, 551; 4 Minn., 282; 15 Wisconsin, 265; 40 Ills., 99, 100 and 101; 23 Wisconsin, 334; 3 Nevada, 131; 16 Gratten, 355; 2 Iowa, 20 and 496; 13 Iowa, 40; 16 Wisconsin, 547; 23 Wisconsin, 343.) The preponderance of testimony is clearly with the defendants. At most in regard to the first or preliminary conversation on the 10th of October, Fraley and son are flatly contradicted by Bentley and Andrews, and the last named are corroborated by Ruffner and Rounds, and all of them swear Burleigh was not present; and, indeed, he only states he heard a preliminary conversation, and not the concluding one.

Then Bentley and Andrews both testify to the concluding agreement on the 4th of November, when the deed was passed and the money paid, and they are as to that wholly uncontradicted, and borne out by the deed upon its face.

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Surely no court can base equitable relief, either in specific terms or by adjudging damages in dollars and cents, upon such allegations and such proofs as are found in this record.

*Wm. Tripp and Bartlett Tripp*, for appellees.

Errors of fact and law cannot be joined in one assignment. To correct errors of fact the party aggrieved must in the first instance apply to the court in which such errors were made; and it is only when he has exhausted his remedies in the court below that the appellate court will take cognizance, and then only of the errors made by the court below in granting or refusing the relief asked for. (2 U. S. Dig., 163, §§ 87, 90, 130, and 181, §§ 613 and 619; 9 U. S. Dig., 190, §§ 635 and 197, § 29; 8 U. S. Dig., 149, § 675; Ohio Dig., 123, § 41; 20 U. S. Dig., 351, § 68.) The appellate court in this case can review the errors of law only apparent upon the record. The cause cannot be heard upon its merits. It can be tried *de novo* only on appeal. (Ohio Dig., 169, §§ 60 and 167, § 33.) Plaintiffs could appeal. (See Organic Act, § 9.) In Ohio, from which state our 1862 Code comes, chancery jurisdiction is confined to the Common Pleas Court, from which appeal and petition in error is not allowed. (Nash Practice, 41-2; Ohio Dig., Title "Appeals," §§ 73, etc. and 167, § 33.) Defendants below made no objection to trial by depositions alone, and cannot raise the objection for the first time in the appellate court. Parol testimony is always admissible to prove the grantee promised to pay a sum additional to that expressed in the deed, and such a promise is valid and binding. (*Nickerson v. Saunders*, 36 Me., 413, approves *Taylor v. Carlton*, 7 Crim'l, 175; *Simmons* Wis. Dig., 232, §§ 74 and 270, § 18; *Minots* Mass. Dig., 294, §§ 6, 8, 9; 26 N. Y., 318; 2 Abb. N. Y. Dig., 676, §§ 920-7-8-9 and 930; 1 N. Y. Rep., 509; *Read*, 514; 1 Abb. U. S. Dig., 220, § 13; 1 U. S. Eq. Dig., 317, §§ 281-3-5, and 453, § 565; 7 U. S. Dig., 159, § 135; 9 U. S. Dig., 131, § 91-2; 11 U. S. Dig., 133, § 79; 14 U. S. Dig., 158, §§ 81-6-7; 16 U. S. Dig., 192, §§ 86, 99; 26 U. S. Dig., 229, §§ 487, 491-2; 27 U. S. Dig., 272, §§ 526-7-32; 29 U. S. Dig., 281, § 487, 496-7.) By answering in chief instead of demurring, defendants below

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submitted their defense to the cognizance of the court, and cannot now raise the objection that plaintiff had an adequate remedy at law. (2 Abb. N. Y. Dig., 555, §§ 74-5-7 and 90-2; *Truscott v. King*, 6 N. Y., 147; Read, 165; 4 Abb. Dig., 433, § 16; 1 Abb. Dig., 135, §§ 118, 119; Minots' Dig., 250, § 45; 1 Abb. U. S. Dig., 266, §§ 1, 2, 3; *id.*, 60, § 210; Ohio Dig., 359, § 123.) Defendants below failing to make any objection to the equity jurisdiction of the court, it was competent for the court to decree damages to plaintiff in lieu of the equitable relief prayed for in the complaint. (9 U. S. Dig., 153, §§ 567, and 155, § 30; 17 N. Y., 491; 18 U. S. Dig. 680, § 93; 19 U. S. Dig., 638, §§ 15, 16, 17; 26 U. S. Dig., 181, § 10; 29 U. S. Dig., 597, §§ 60 and 299, § 154; 1 Abb. U. S. Dig., 266, §§ 3 and 59, § 198.) The record does not show but this action was tried on the law side of the court. Plaintiff below asks a judgment for damages, and the record shows he got such judgment. The complaint is sufficient to sustain an action in law or equity. The issue raised by the answer is that of additional consideration, and the most of the testimony is to that issue. Parties can waive a trial. (1862 Code, 90, §§ 260 and 276.) Record does not show any objection to trial by court, and the presumption is a jury trial was waived. (17 N. Y., 491-8; Wait's An. Code, 444, n. i.) And the decision of the court not being required to be in writing, (1862 Code, § 277,) it is presumed the court found the facts which support the judgment, for every presumption is in favor of the judgment. (1 Abb. U. S. Dig., 62, § 254.) And if it were error to render a judgment for damages in an equity suit, and the record shows that such judgment was rendered, but does not show that it was tried on the equity side of the court, it will be presumed to have been tried on the law side of the court if, thereby, no error arise.

BARNES, J.—This suit, or action, is brought into this court by appeal, prosecuted by defendants below. The first important question presented is, as to the character of this suit or action.

The petition has the substantial requisites of a bill in chancery, and an action at law. So, too, the summons is for

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specific relief and for a judgment for damages. Manifestly here is a misjoinder of actions—a pleading bad upon the face. But can the defendants now avail themselves of any advantage on account of the improper joinder of actions? We think not. This objection should have been taken by demurer, motion to strike out, or, perhaps, by motion to compel the plaintiff to elect upon which cause of action he would proceed.

These rights the defendants lost the moment they took issue upon the plaintiff's petition. They then waived any objection to the first pleading, except such as were jurisdictional, and that the complaint or petition as a whole did not state facts sufficient to constitute a cause of action.

This waiver is to be construed like a stipulation or agreement, that defendants are content with the plaintiff's pleadings, and take issue upon it as presented.

It is unnecessary longer to pursue this investigation, as touching the equitable relief sought, as none was decreed, and, therefore, that branch of the case is disposed of.

The judgment appealed from then, being judgment in an action at law, the first natural inquiry would seem to be, are the appellants, in this court, in such a way as to urge objections if they really exist?

Without attempting to settle the practice upon that question, as this is, probably, the only cause that will be presented under the Act of 1862, the same being repealed, we have concluded to regard this case as properly before us, and to dispose of it upon the merits.

Before considering the evidence, it is proper we should dispose of a preliminary question: Is a deed, in the usual and ordinary form, such a written agreement that the parties to it are estopped from showing, by proof, *aliunde*, the true and actual or additional consideration, beyond the consideration named in the deed?

We think not. And we regard the following authorities sufficient upon that point, although many more might be cited: (36 Maine, 413; 7 Greenleaf, 175; 23 Wisconsin, 519; 26 New York, 378; 17 Ohio, 617.) But the appellants insisted

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if this is to be treated as an action at law, then the court below erred in allowing the testimony to be taken by deposition.

We think not. The defendants, by consenting to the blending of the two causes of action, consented that evidence might be received in any of the modes applicable in an action at law or suit in equity. And we might with propriety here remark, that it comes with a bad grace for a party to lay by in the lower court and allow all the advantages he might have availed himself of to pass unchallenged, and then come into this court and complain of that which results from his own carelessness or cleverness in the court below.

We are gratified to know this criticism does not apply to the counsel now engaged in this cause, as they are in no way answerable for the pleadings on trial in the court below. The next question then is, this: Is there evidence to support the finding?

The complaint, or petition, charges that this land was of the value of one thousand dollars or more. That the defendants agreed to give plaintiff cash, four hundred dollars (\$400,) lumber, one hundred dollars (\$100,) and to erect on their, the defendant's, own land, thus purchased, a steam saw-mill, in the following season, the erection of which, in the immediate vicinity of the plaintiff's other lands, would have been to the plaintiff, by enhancing the value of his adjoining lands, at least worth five hundred dollars, and that this last consideration (the building of the mill) formed an important or controlling consideration for the conveyance of the one hundred and sixty acres of land.

Was this land conveyed worth one thousand dollars or more? We think the preponderance of the evidence clearly established that proposition. There is the testimony of the plaintiff, of Benton Fraley, and of Burleigh, all estimating the land at about that sum, and one or more at higher figures. Then there is the testimony of the defendants, stating that the five hundred dollars, the consideration in the deed, was all the lands were worth; but it should be remembered, however, that the two Fraleys give some reasons upon which they base their judgment. They state that four or five hundred

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dollars worth of timber was, after this sale, taken from a few acres of this land, and all agree it was a valuable timber lot.

We have no difficulty in determinating that the evidence fully establishes the fact that the value of the land conveyed by the plaintiff to the defendants, was worth at least nine hundred dollars. But did the defendants agree to pay the plaintiff that sum for it? This is the most difficult feature of this case. Fraley swears that the defendants applied to him to purchase the land, and stated they wanted it to build a steam saw-mill upon; that he said to the defendants, "we needed a mill bad in the neighborhood, and for the sake of getting a mill I would let you have the land." They wanted to know how much he would take for the land. He told them he was not willing to take less than one thousand dollars. They replied in substance, "I ought to take less for the purpose of having a good mill upon it." Now mark the language: They did not question the value of the land, or insist the price was too much; but urged the benefits to him by reason of the building of a good steam saw-mill. The witness says: "they then made me an offer of four hundred dollars in cash, one hundred dollars in lumber." I then asked them "when they would build the mill?" "they told me they would go right to work getting out the timber, and would have the mill completed in the spring of 1866," being the next spring. "I then said to them, if they would give me four hundred dollars in money, and complete the mill in 1866, and give me one hundred dollars worth of lumber, they could have the land." This proposition they accepted.

This testimony is strongly corroborated by Benton Fraley and Dr. Burleigh; and Burleigh, although called first by plaintiff, is recalled by defendants. This testimony is in part, and only in part, denied by the defendants.

The defendants swear they only agreed to pay four hundred dollars for the land, and that they did not agree to build the mill. But Mr. Bentley swears that the building of the mill was talked of between them, and that Fraley wanted the defendants to give a bond conditioned that they would build the mill; and this is inconsistent with the idea that they had

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not agreed to build the mill, and strongly corroborates the statement of Fraley, at least so far as to prove that up to that time Fraley understood the building of the mill to be a part of the considerations for the land. Fraley and Bentley agree that Bentley and Andrews declined to give the bond, but each assigns a different reason for the refusal. Bentley says they declined because they had not agreed to build the mill, and Fraley says they declined, and gave as a reason that they were going to getting out the timber at once, and that their word was good for what they had agreed to do. But another important item, as evidence, bearing upon this matter of agreement to build the mill, is the second allegation of the answer of defendant Bentley. He there states that to induce Fraley to sell Bentley and Andrews this land, W. A. Burleigh gave Fraley a property interest of one hundred dollars. This is also proved by Burleigh himself—that he was desirous of having a steam saw-mill built, and to help the matter along and get the mill, he gave Fraley some landed interest.

The evidence, then, is clear that it was understood by all the parties that this steam saw-mill was to be built in the spring or summer of 1866, and we think the preponderance of the evidence is so strongly in favor of the plaintiff, that it was a part of the agreed consideration for the purchase of the land in question, that the mill should be built, that the court below was justified in so finding.

It is with much zeal argued that there was no description or kind of mill agreed upon, and no time that the mill should remain on the land. We need only apply a good common sense rule to settle this question. A good steam saw-mill, as ordinarily understood, would be a mill capable of doing such work, and to such amount, as is ordinarily done by good mills; the words "good mill" have a reasonably definite meaning. But we are told there is no rule applicable by which the damages in this case can be assessed; that the benefits to be derived by plaintiff, if any, were remote, speculative or fanciful.

We think not. Fraley swears he asked one thousand (\$1000) dollars for the land, and the evidence shows it was



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worth that sum, and that defendants did not ask him to take less, or question the value of the land, but urged that the benefits by reason of the building of the steam saw-mill, with the four hundred in money, would be a fair payment for the land. If, therefore, the testimony of Fraley is to be regarded as true, strongly corroborated in many particulars by the testimony of other witnesses, it must be said that the benefits to be derived by the plaintiff, as agreed and understood by the parties, was the difference between the price actually paid and the value of the land; and this furnishes a very correct rule, tested, however, by another rule, namely: That as a consideration for the defendant's agreement to build a steam saw-mill in a certain place, by a certain time, the plaintiff paid the defendants in the sale of the land the sum of five hundred dollars, in the conveyance of this land, the defendants having entirely failed to build the mill, the least that can be said is, that in equity and good conscience, the plaintiff should recover the value or amount he paid for defendant's promise and agreement to build the mill. Or by still another rule. The evidence clearly establishes the fact that the increased value of Fraley's land in the immediate vicinity of this land, would have been at least five hundred dollars. We think, therefore, that the court below was fully warranted in estimating the damages the plaintiff had sustained at five hundred dollars, and we find no reason for interfering with that finding. Let the order be, that the finding and judgment in the court below are affirmed with costs.

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See Appendix, Note A.

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## BENTLEY, ET AL. V. FRALEY.

1. *JURISDICTION: APPEARANCE: WAIVER.* After a cause has been heard in the Supreme Court, and remanded for a new trial, the general appearance entered by appellee or defendant in error, in the court below, and submitting to its jurisdiction, by having a trial on the merits, without any objection, is a waiver of any error which might have been committed in the transmission of the decision of the Supreme, to the District Court.

*Writ of Error to the District Court of Yankton County.*

THIS cause was removed to this court by writ of error, on the grounds of alleged error of the court below in confirming a sheriff's sale. The judgment of confirmation was reversed, and the cause remanded. On a second hearing in the court below the motion to confirm was denied and the sale set aside, after which defendant in error filed his motion for a re-argument of the case in this court. Other facts necessary to a full understanding of the points decided, sufficiently appear from the opinion.

*J. D. Boyer and Moody & Hand, for plaintiffs in error.*

When *lands* are sold upon execution, the proceedings of the officer must be all *regular*, as the law requires, to give title, and must also appear of *record*. (1 Greenleaf's Ev., §§ 124 and 130; Hilliard Sales, 80, § 65; 12 Johnson, 456; 16 Shepley, 211 and 212; 1 Comstock, 163; 18 Pick., 475; 2 Wall. U. S., 317.) In the case at bar, the irregularity consisted:

1. The appraisers were not all *freeholders*.
2. They were not sworn as the statute directs, in this: The statute requiring they shall be sworn to appraise the land upon *actual view*. The oath only requiring them to *impartially* appraise it. (Laws 1862, § 444; Nash, 627.)
3. No endorsement of "no goods" was made upon the execution prior to the levy upon the lands. (Id. 1862, § 437.)
4. The execution was for \$543.23 while the judgment was

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for but \$500, thus rendering it clearly irregular. (2 U. S. Dig., 356, § 938.)

5. The levy was upon the *land*—the advertisement was to sell the *interest* of Bentley & Andrews in the land. Our statute only makes the *land* subject to sale and not the *interest* of the party in the land.

6. Nowhere does it appear by the *statement* or *affidavit* of the officer that the requisite notices were posted in five places. Attempt was made to prove loss of execution and return, but the only proof was affidavit of clerk and not that he had *diligently searched*. Nor was there any proof but what plaintiff in the execution or his attorneys might have known where it was. Until the proper proof was made no proof of its contents was admissible. But there was no attempt by plaintiff in court below to even prove *contents* of execution and return. The only proofs upon which the order of confirmation was made, were the *affidavits* of certain persons including the sheriff of *what had been done* in the premises. Nothing that was of any binding force or effect, and if *false* the defendants in the execution were without remedy. They could not sue the sheriff for false return. Such proof is something the law does not recognize, and upon it no title to *land* can be based. (4 U. S. Dig., 760, § 567.) The only proper, *legal*, proof was the *return of the officer upon the execution*; and if it is lost, a new one could be supplied by the order of the court upon notice to other party and motion, and the *return endorsed thereon*. Then if *false* the party had his remedy. (See 1 Abb. Dig., 119, § 564; See 2 Abb. Dig., 647, § 590; See 3 Abb. Dig., 46, § 421; 1 Abb. Dig., 109, § 450; 1 Abb. Dig., 110, § 458; 2 U. S. Dig., 316, § 39.) These lands were exempt from levy and sale under exemption laws, as a homestead, and defendants had a right to select them as such. Therefore, the levy and sale passed no title, and defendants ought not to be driven to the necessity of bringing suit to remove cloud sought to be cast upon their title by the proposed deed upon confirmation of sale. (2 U. S. Dig., 356, § 937; Laws 1862, p. 300, § 3.)

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*Tripp & Bartlett*, for defendants in error.

The land sold was not exempt from execution and sale under the laws of the Territory. (Laws of 1862, p. 299, §§ 1, 2, 3; Ills. Statutes, Vol. 1, 650; 46 Ills., 327; 44 Ibid. 374; 43 Ibid. 232.) The motion was to confirm a sheriff's sale, and the judgment was not in controversy, and it could not be. 'A judgment cannot be attacked thus indirectly or collaterally. (Ohio Dig., 150, 151, 153, 154.)

KIDDER, J.—The defendant in error, claiming that this action is now here, makes a motion for a re-argument of the same.

The proceedings heretofore in relation to the motion, are these: Before the January term of this court in 1871, the defendant had secured a judgment in the District Court against the plaintiffs in error for several hundred dollars, had prayed out his writ of execution thereon, and had delivered it to the sheriff of Yankton county to collect, who, in pursuance thereof, had levied upon and sold the real property of the plaintiffs, or one of them. Pursuant to the Statute of 1862, page 125, Sec. 449, which authorized such proceedings, the defendant made a motion to the court to confirm the sale of the sheriff, and such proceedings were thereupon had, that the sale was by the court confirmed. The plaintiffs excepted to the decision of the court, and brought the case to this court at the January term in 1871, by petition in error, (which was then in accordance with the statutes of this Territory) for revision. At that term a hearing was had and the court reversed the judgment of the court below confirming the sale, and remanded the *motion* and *case* to the District Court, which decision was transmitted thereto and entered, on motion of the plaintiffs, among the records thereof. And at the September term of the District Court in 1871, a motion was again made to confirm the sale by this defendant, and on a full hearing on the merits, the motion was overruled and the sale set aside.

The defendant excepted to the decision, appealed to this court and entered his action upon the calendar. And at the January term in 1872, he caused the court, upon his motion,

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to have entered upon the calendar "*mis-entered*;" hence the case was effectually dismissed therefrom.

The statute at that time, in relation to the reversal of judgments, was this: "When a judgment or final order shall be reversed, either in whole, or in part, in the Supreme Court, the court reversing the same shall proceed to render such judgment, as the court below should have rendered, or remand the case to the court below, for such judgment; and the court reversing such judgment or final order, shall not issue execution in causes that are removed before them on error, on which they pronounced judgment, as aforesaid, but shall send a special mandate to the court below, as the case may require, to award execution thereupon," etc.; *vide* Statute of 1862, page 141, Sec. 530.

This was not a case wherein the court should send a *special mandate* to the court below to award execution upon their judgment,—such a proceeding would be proper when their judgment is final, and nothing more need be done, except to execute the judgment, or enforce it, or award execution thereupon. The effect of the decision in this case was merely to open it for a new trial.

The general appearance entered by the defendant in the court below, and submitting to its jurisdiction by having a trial on the motion, on its merits, to confirm the sale, without any objection, is a waiver of any error which might have been committed in the transmission of the decision to the District Court. We are, however, of opinion that there was no error committed in the transmission of the decision, that therein there was a substantial compliance with the statute, and that the defendant, without having any of his rights abridged, has had his full "day in court;" and, therefore, the motion is

OVERRULED.

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 Clark, et al vs. Bates, et al.
 

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## CLARK, ET AL. V. BATES, ET AL.

1. **INDIAN COUNTRY: PURPOSE AND EFFECT OF NON-INTERCOURSE ACT OF 1834.** The purpose and effect of the Non-Intercourse Act of 1834, was to declare and proclaim what was then Indian country; country in which the manners, customs and laws of the Indian tribes prevailed, and in which the United States should protect them in all their natural and guaranteed rights, and not to declare or maintain that to be Indian country, which was not in fact in the occupation and under the control of the Indians.
2. ———: **CEDED: RIGHT OF OCCUPATION.** The policy of all branches of the government, from the earliest times, has been to protect all citizens in the occupation of ceded Indian country, and to secure cessions as fast as demanded by the increase of our own population, and when territory has once been solemnly ceded by the Indians, it has never afterwards been considered or treated as Indian country for any purpose.
3. ———: **EFFECT OF CESSION BY TREATY.** Cessions by treaty, duly proclaimed by the President, have always been considered and treated by the people of the United States, as an invitation from the Executive department to all people to come, open and possess the ceded country.
4. ———: **EFFECT OF TREATY OF 1868.** The Non-Intercourse Act of 1834, wherein it fixed and determined the limits of the Indian country, was modified and changed by the treaty with the Dakota nation of Indians, made in 1868, as it had been by various other preceding treaties.
5. **TRESPASS: UNDER LEGAL PROCESS.** The suing out of legal process, and the delivery of the goods to the officer having it, is part of the same transaction, and in the eye of the law, wilfully set on foot and consummated by the party suing out the process, and he is liable to the party against whom the proceedings are instituted for the damages actually sustained.
6. ———: ———: **DAMAGES: MITIGATION.** The rule as to what may be shown in mitigation of actual damages sustained in actions of trespass, should be limited to evidence of actual benefit received by the plaintiff, after the trespass, from the property taken.
7. ———: ———: ———: ———. If after the property has been taken in trespass from the owner, an execution against him is levied thereon and the property sold, and a judgment against the owner thereby satisfied, this may be shown in mitigation of damages, and the law will presume the assent of the owner to such application of the property as is for his benefit, to the extent of such benefit.
8. ———: ———: ———: ———. Where the verdict is only for actual damages sustained after deducting all benefits derived by the plaintiff from the return of some portion of the goods, it is incompetent to show in mitigation of damages that after the trespass was committed, and before the goods were returned, they

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were in the custody of the law, under and by virtue of process, for the purpose of enabling the jury to deduct from the aggregate damages, the damages done the goods while in such custody.

9. **PRACTICE: FORMS OF PROCEDURE: DAMAGES.** While under the old practice a portion of the damages only might have been proved and recovered in an action *vi et armis*, and another portion only in an action of *trespass on the case*, under the Code all may be shown and recovered under the complaint stating the simple facts.
10. ———: ———. All distinctions in old forms having been abolished, all damages may be recovered in one action, that flows from the original trespass, and the original trespasser must respond to the extent of the damages.

*Appeal from Yankton County District Court.*

THE complaint in this action sets forth, that during the month of February, 1873, the plaintiffs were co-partners, engaged in the mercantile business on James River, in Dakota Territory, near the point where the Northern Pacific Railroad crosses said river. That plaintiffs' stock consisted of a general assortment of merchandise. That on the 23d day of February, 1873, the defendants unlawfully, maliciously and with force and arms entered plaintiffs' place of business, and took and carried away all of the goods therein of the value of six thousand dollars, and converted the same to their own use. The complaint concludes with the usual prayer for judgment.

Defendants in the third count of their answer, allege "that all the country at, and near the point where the Northern Pacific Railroad crosses the James river, was, on the 21st day of February, (1873) and for a long time had been, and still is, Indian country, within the true intent and meaning of the Act of Congress, entitled 'An act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontier,' approved June 30, 1834.'"

This portion of defendants' answer was, on motion of plaintiffs, stricken out, when they asked and obtained leave to file a separate and amended answer, in which they allege in substance:

1. That at the time of the alleged trespass defendant Bates was a Captain, and defendant Yeckley a Lieutenant in

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the U. S. army, (Yeckley subject to the orders of Bates) both on duty at Fort Seward, located near plaintiff's place of business. And that whatever they did was done in obedience to orders from the commanding officer of the department of Dakota, to enforce the provisions of the said Act of Congress, approved June 30, 1834.

2. That defendant Bates believing that all of said country was then Indian country, and that the plaintiffs had introduced spirituous liquors into said country, and there had the same in store with the stock of goods mentioned in the complaint, he ordered Yeckley with others to search said store, and in case they found spirituous liquors therein, to seize the said stock of goods. Yeckley with others searched the store, found liquors therein and seized the entire stock of goods.

3. That immediately thereafter Bates notified the U. S. Attorney for the Territory of Dakota, and such proceedings were thereupon had; that before the commencement of this suit the goods were taken by defendant Moore, Deputy U. S. Marshal, on a warrant of attachment, issued out of the United States District Court upon a libel of information in behalf of the United States and against said property, and afterwards and before the commencement of this suit, all of said goods and property were delivered to the plaintiffs, and by them received and accepted. And further, that the proceedings against said stock of goods were then still pending in said court.

On the trial the defendants asked the court to give to the jury the following instructions, which were refused and defendants excepted:

1. "If the jury find that defendants seized the goods in question, having probable cause to believe and believing that they had been forfeited to the United States by acts of the plaintiffs, and for the sole purpose of placing them in custody of a court having jurisdiction to declare and enforce such forfeiture, and that the goods were taken from the defendants by a U. S. Marshal upon a warrant issued by a court having such jurisdiction, commanding such Marshal to seize such



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goods, the defendants cannot be held liable for any damages to such goods, occurring after the goods were so taken from them."

2. "If the jury finds that the goods in question, were rightfully taken from the defendants, after their seizure, by a U. S. Marshal, upon a warrant of attachment, issued by a court of competent jurisdiction, the defendants have a right to offset the value of the goods, when so taken, against the value of the same goods at the time of their seizure."

3. "If the jury find that either of the defendants, in making the seizure of the goods in question, acted under and in pursuance of the immediate and imperative orders of a superior military officer, and that such orders were executed by such inferior officer without malice, oppression, or fraud, or negligence, such defendant is not liable to plaintiffs for any damages resulting from said seizure."

4. "If the jury finds that the seizure of the goods in question, by the defendants, was preliminary to a judicial proceeding in a court of competent jurisdiction, commenced against said goods for the purpose of having them adjudged forfeited to the United States, for acts of the plaintiffs, and that such goods were, after their seizure by the defendants, rightfully seized by a U. S. Marshal upon a warrant issued by a court of competent jurisdiction, in such proceedings, and that such proceedings are still pending, and undetermined, the defendants cannot be held liable for damages resulting from said seizure."

The court charged the jury as follows, to which defendants excepted:

1. "If you, from the evidence, find that the defendants took the goods from the plaintiffs, as charged in the complaint, then I charge you that the plaintiffs are entitled to a verdict in their favor."

2. "If you find that the plaintiffs are entitled to a verdict, then I charge you that the amount the plaintiffs are entitled to receive from the defendants, is the difference between the value of the goods at Jamestown when taken, and the value of the goods at Fargo when returned to them."

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Verdict and judgment for plaintiffs, and defendants appeal.

*O. P. Stearns*, for appellants.

Principal question on this appeal: was the country on the line of the Northern Pacific Railroad, immediately west of the James River in Dakota Territory, on the 21st day of February, 1873, Indian country, within the true intent and meaning of Non-Intercourse Act of June 30, 1834?

Section 1, of that Act provides "That all that part of the United States west of the Mississippi River, and not within the States of Missouri and Louisiana, or the Territory of Arkansas, and also that part of the United States east of the Mississippi River, and not within any state to which the Indian title has not been extinguished, for the purpose of this Act be taken and deemed to be the Indian country. (4 U. S. Stats., 729.) The plaintiffs contend that it was not the intention of Congress to include any country to which the Indian title has been extinguished, within the limits of "the Indian country" as defined by the Act, either east or west of the Mississippi River, that *Indian country and country to which the Indian title has not been extinguished* are synonymous.

The defendants contend that by the Act, all the country then in the United States west of the Mississippi River, not in Missouri, Louisiana, or Arkansas, was made *Indian country* for the purposes of that Act, whether the Indian title has been extinguished or not, that the words "*to which the Indian title has not been extinguished*" have no reference to country west of the Mississippi River.

It is well known that the country claimed and held by the several tribes and bands of Indians in the United States, is generally, if not universally without definite boundaries and that not unfrequently portions of the same territory are claimed and alternately occupied by different tribes or bands of Indians. This was especially true of the vast prairie region lying between the Mississippi River and the Rocky Mountains. At the time of the passage of the Act in question it was inhabited by roving bands of Indians, who hunted wherever

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game chanced to be most plenty, and claimed and occupied such regions of country, as for the time being, best suited their convenience. To the government of the United States, little was then known as to much of this region, and still less as to the limits of territory claimed by the several bands of Indians. Under the Act of March 30, 1802, (2 Stat., 139) which provided for a shifting boundary line, such as is contended for by the plaintiffs, from a multiplicity of treaties with the several tribes and bands, it became difficult to ascertain what were the limits of the Indian country, though that Act applied to a timbered country, wherein the Indians are much less migratory in their habits than those who live in prairie regions. We should hardly expect Congress to perpetuate these inconveniences and multiply them ten fold by applying the same principle to the region in question. When a law makes it highly penal to do an act on one side of a line which it is lawful to do on the other side of the line, it certainly is highly important there should be easy means of determining very definitely where such line is.

But the best evidence of the intention of Congress in the premises, is the language used in section 1, of the Act, and whether we give to that language its most plain and obvious meaning, or apply to it the most rigid rules of grammatical construction, it leads to the conclusion contended for by the defendants.

So far as we are aware, there is no reported adjudication of the question under consideration, but the understanding of the framers of the Act of June 30, 1834, was in accordance with our construction of it. The committee which reported the Act to the House, remarked, with reference to the Indian country, as defined by the first section, as follows: "*On the west side of the Mississippi, its limits can only be changed by Legislative Act,*" "on the east side of that river it will continue to embrace only those sections of country not within any State, to which the Indian title shall not be extinguished." (See report of Committee, House of Representatives, No. 474, 1st Session, 23d Cong., 1, 10.) And the present Attorney General of the United States takes the same view of the law

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as originally enacted, without deciding what effect subsequent legislation, and the general course of events, has had in restricting its applicability. (See Genl. Orders No. 98, War Dept., Oct. 13, 1873.) Assuming our construction of section 1, of the Act of June 30th, 1834, to be correct, we have next to inquire whether any subsequent legislation, or anything else, has had the effect to render it lawful to have and deal in spirituous liquors at the place in question.

We are not aware of the existence of any statute that in terms exempts any portion of the territory west of the Mississippi, originally defined as Indian country, from the operation of the Act.

Has there been any subsequent legislation that by implication repeals or modifies section 1, of the Act in question, as applied to the *locus in quo*. We will not anticipate the plaintiffs by calling attention to the laws that may be supposed to have had this effect, but will call attention to the well settled principles by which all claims of repeal or modification by implication are to be tested.

One statute is not to be construed as a repeal of another if it be possible to reconcile the two together. (Sedgw Stat. and Const. [Law, 127; *Harford v. United States*, 8 Cranch, 109. *Cool v. Smith*, 1 Black, 459.) To create a repeal by implication, there must be a positive repugnancy between the provisions of the new law and those of the old, and even then the old law is repealed by implication only, to the extent of the repugnancy. (*Wood v. United States*, 16 Pet., 342; *Daviess v. Fairbaern*, 3 How, 636; *Harden v. Gordon*, 2 Mass., 540.) Tried by these well settled rules of law, we are not aware of any legislation that by implication repeals or modifies to any extent the section under consideration. It will probably not be contended that the mere organization of a temporary territorial government would *per se* have this effect, or that there is anything in the Act of Congress establishing territorial governments inconsistent with a law excluding spirituous liquors; besides the Act establishing the Territory of Dakota specially reserves to Congress the regulation of all matters pertaining to the Indians. (12 Stat., 289, Sec. 1.) Nor will it

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be contended that an Act of a territorial legislature can repeal a law of Congress.

It is probable that the treaty of April 29th, 1868, (15 Stat., 636,) extinguishes all title of the Indians to the lands in question except the right of hunting, reserved in the treaty, but we have shown that this alone does not determine the status of the country under the non-intercourse law.

Secondary question: Assuming the taking of the goods in question by defendants, to have been unlawful, what was the true measure of damages? The value of the goods when taken, less their value when returned to the plaintiffs at Fargo, or less their value when seized by the U. S. Marshal?

General rule of damages for wrongful taking of goods which have been returned to owner, admitted to be, value of goods when taken, less value when so returned.

Where a creditor tortiously takes the goods of his debtor and afterwards causes the same goods to be seized on an attachment or execution in an action brought by himself against the debtor and the goods are sold on such execution, in an action by the debtor against the creditor to recover damages for the original tortious taking, the fact of such seizure may be shown in mitigation of such damages, and the debtor can only recover damages for the original taking and the detention until the seizure on attachment or execution. (*Curtis v. Ward*, 20 Conn., 204.) Some authorities deny the last proposition, solely on the ground that the trespasser cannot, by any mere act of his own, rid himself of any liability originally incurred, (*Hanmer v. Wilsey*, 17 Wend., 91,) but where the goods are delivered by the trespasser to an officer holding a writ issued by a court of competent jurisdiction, in a suit against the owner not instituted by the trespasser, nor prosecuted for his benefit, duly authorizing said officer to seize such goods, reason and authority concur in regarding such delivery as the equivalent of a delivery to the owner himself. Goods so taken by an officer are held by him under the law, in trust for the owner, until in pursuance of a judgment of the courts they are returned to the owner or otherwise disposed of. In no event can they be returned to the tres-

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passer; in no event can the proceeds of any sale of the goods be applied to his benefit. If the goods be forfeited and condemned for acts of the owner, it is no fault of the trespasser and he cannot be held responsible for it. If the officer fails to take proper care of the goods, he is responsible to the owner and not to the trespasser. So far as the trespasser is concerned, the goods are, to all intents and purposes returned to the owner when they are delivered to the officer. When the trespasser thus delivers the goods, his liability is fixed and determinate; he has no power to increase or diminish it by exercising any control over the goods, nor can it be increased or diminished by the acts or omissions of officers of the law rightfully holding the goods for the owner, and it is believed that no reputable authority can be found directly controverting this doctrine.

The case of *Kaley v. Shed*, 10 Met. 317, is a strong case very nearly in point. The jury were instructed that if defendant intended in good faith to return the goods according to the demand, but before a reasonable time had elapsed, they were attached and taken from the defendant into the custody of the law, the measure of damages would be the injury sustained by the plaintiff by the taking and detention of the goods to the time of the attachment, and that the defendant would not be liable for any portion of the value of the goods, although it might not be shown that the goods ever after went to the use of the plaintiff.

On appeal, held correct, Shaw, C. J., delivering the opinion of the court, and among other things remarking: "the property was in the custody of the law, by legal process, which the defendant could not resist or control. \* \* \* The plaintiff's case assumes that the goods were his property, they were attached as his \* \* they are laid up in the custody of a responsible officer for his use, to be delivered on demand. In no event could the defendant claim them."

As bearing more or less, directly on the question at issue, we cite: *Kaley v. Shed*, 10 Met., 317; *Higgins v. Whitney*, 24 Wend., 379; *Curtis v. Ward*, 20 Conn., 205; *Prescott v. Wright*,

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6 Mass., 20; *Paree v. Benjamin*, 14 Pick., 356; *Squires v. Hollenbeck*, 9 Pick., 551; *Greenleaf Bank v. Leverett*, 17 Pick., 1; *Irish v. Cloyes*, 8 Vt.; *Wehle v. Hawland*, 42 How Pr., 399; *Edson v. Weston*, 7 Cow, 279; *Sherry v. Schuyler*, 2 Hill, 204; *Ball v. Liny*, 48 N. Y., 6.

*J. B. & W. H. Sanborn*, for appellees.

Is section 1, of the Non-Intercourse Act of 1834, 4th U. S. Statutes, 729, to be construed as fixing and determining what country or territory shall, for the purposes of that act, be Indian country, so that neither the course of events, subsequent treaties between the United States and the Indian tribes occupying the same, nor any thing, other than a subsequent act of Congress, can change its condition, so that it will not longer be "Indian country" for the purposes of that act?

The act declared that to be Indian country which was in fact unceded Indian country at the date of its passage. This is general history known to the courts as to all other men. At that time the country from the Red River of the North to the Missouri River, and from the British Possessions to the State of Missouri, with the exceptions of a few small reservations for other Indians, was occupied by the Dakota or Sioux Nation of Indians. By the treaty of April 29th, 1868, (15th Statutes, 636,) this nation ceded all these lands to the United States for ample consideration. (Article II. of said treaty, p. 636.) This cession is absolute and without any reservations. Articles eleven and fourteen of said treaty, so far as they relate to country north of the North Platte, must be construed together and with reference to other parts of the treaty. So construed, the country in these articles referred to is the country east of the summit of the Big Horn, and west of the 104th degree of longitude west from Greenwich. This was the country through which the military road passed that had to be closed, and in which the "military posts" were that had to be abandoned. (See Article sixteen of said treaty.)

All departments and officers of the United States Government have considered and treated the "Indian country" as

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extending to and including only such country as Indians occupy and which remained unceded by treaty. Large cities, wherein for many years liquors have been kept and sold by wholesale and retail, in violation of the Federal Statutes, if the appellants, are correct, have grown up in the Indian country of 1834. The knowledge of all men as to the present condition of the country embraced in the Indian country of 1834 is cited in support of this position.

The Act of 1834, wherein it defines and limits the "Indian country," has been superseded and modified by all the treaties since made between the United States and Indian tribes occupying the same, by which portions of such country have been ceded to the United States. Country ceded by the Indians to the United States is no longer Indian country. Treaties may supersede prior acts of Congress. ("The Cherokee Tobacco" case, 11 Wallace, 621; *Foster & Elam v. Neilson*, 2 Peters, 314; 8th Curtis, 121.) The construction claimed by the appellants leads to the greatest absurdity. If in 1835 all the Indians in the Indian country as described in the Act of 1834 had made a treaty ceding all that country, and had thereupon removed from the United States, the country would still have been Indian country and the non-intercourse law in full force. This could not have been for the reasons:

1. That the treaty would have superseded the law, and the country have become a part of the public domain, free and clear from all Indian title.

2. The reason of the law having ceased, the law itself ceased, and the general laws of the United States governing trade and intercourse between citizens would have become applicable to that country as to all other portions of the country.

Congress, by the Act of 1834, had no purpose to and did not make that Indian country which before the passage of said act was not so. Congress simply proclaimed the existing state of facts as to what the Indian country then included. For the time being and until portions of this country were ceded by treaty, voluntarily abandoned or taken from the Indians by conquest, this statute was binding on the courts,



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but no longer. The courts are just as much bound by subsequent events and treaties, so far as boundary lines are changed thereby, as they would be by subsequent acts of Congress. The question of what is Indian country and what is to be treated as Indian country is a question to be determined by the courts with reference to the laws, treaties and facts pertaining thereto. Congress has not the power to declare that to be Indian country which is not Indian country, and by such means exclude the citizens of the United States from the possession and occupation thereof, or from carrying on lawful trade and commerce therein under the general laws.

The positions and authorities taken and cited by the appellants upon the rule of damages are in no respect applicable to the case at bar. In this case an officer of the United States Government, authorized to seize the goods and property of citizens under certain circumstances, without process, and hold them until he notifies a United States Marshal, and until the Marshal appears with process to take and hold the goods (13 U. S. Statutes at Large, 29,) under the misapprehension that the circumstances authorized such seizure in this case, unlawfully seized and took the goods and property mentioned in the complaint from the plaintiffs, and notified the Marshal, who thereupon procured process and took possession of the same goods, and thereafter, finding the seizure by the defendants and himself unlawful, turned all this property back to the respondents. In such a case the rule must be that the plaintiff is entitled to recover the difference between the value of the goods when and where taken and the goods when and where returned, against any defendant, against whom an action of trespass can be maintained. And this principle is sustained by the authorities cited by respondent.

In the case of a levy of an attachment or execution without the connivance or aid of the original trespasser, for valid cause to satisfy debt, the law simply does that which the debtor should have done—applies the debtor's property to the payment of his debt; and when the law takes possession of it and applies it to this purpose it may be the same as if the

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owner had taken full possession, and any damage done or happening thereafter may be the same as if it had been done by the owner or happened when in his possession. But in this case the original trespasser induced the seizure for the purpose of having the goods libelled and forfeited when there was no debt and no liability to forfeiture, otherwise the goods could not have been returned. The reason why courts will not allow a party to have his debts paid with his goods and thus recover the full value of the same in an action of trespass because there was a tortious taking before a legal levy, is plain; but the reason why courts should not allow a party whose goods and property have been unlawfully taken from him by the defendant and detained for a time and then returned to him, to recover the damages he has sustained by such unlawful taking and detention, is difficult to see. And it can make no difference in such a case that the goods were a portion of the time in the custody of the law at the instigation of the original trespasser. To protect the original trespasser at all, the result must show that such goods were taken into legal custody without his connivance for valid cause, and that the owner, his creditors or the country, has derived some benefit from such legal proceedings. The risks of all miscarriages are with the original trespasser in any event. The right of action by the respondents against the appellants for the entire value of the goods was complete the moment the goods were unlawfully taken, and their liability in damages cannot be mitigated or changed by what the law afterwards attempted to do, and failed to do. The return of the goods, the disposition of the same for the benefit of the owner by virtue of legal proceedings, or the confiscation and appropriation of the same by the law, might be shown in mitigation of damages. But the burden of proof was on the defendants, to show a disposition made either with the actual consent of the respondents, or by such legal seizure and sale under process as would in law necessarily imply consent. But no sale under process was claimed. The seizure was temporary and made at the instigation of appellants, and damage to the goods under such seizure cannot be shown in mitigation of damages. There was no error in the instruc-

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tion below. (Greenleaf on Evidence, Vol. 2, Redfield's edition, 1868, p. 550, and notes and authorities there cited; Sedgwick on the Measure of Damages, 5th edition, 615, Note 1, and authorities.)

KIDDER, J.—The plaintiffs brought an action of trespass *de bonis asportatis* against the defendant for taking and carrying away a stock of merchandise of the plaintiffs, from their store, which was situated near the Northern Pacific Railroad on the west side of James River. The defendants admitted the taking, and justified upon the grounds that they were commissioned officers in the United States army and on duty at Fort Seward; that liquors constituted a part of said stock taken by them, and had been introduced by the plaintiffs, and that the country where the store and the stock of the defendants were situated, was "*Indian country*" within the meaning of the Non-Intercourse Act of 1834, and the amendments thereof. 4 U. S. Statutes, 729; 13 do., 29, and pleaded other matter in mitigation of damages.

The plaintiffs moved to strike out the matter pleaded in justification on the grounds that it was sham, frivolous and constituted no defense to the plaintiff's action. And the court below granted this motion, and the appellant assigns this ruling of the court as one, and the chief error.

The country between the James and Missouri rivers has from the earliest times been in the occupation and under the control of the Sioux or Dakota Nation of Indians. The more northern portion, including the country where the plaintiff's store was situated, having been occupied by the Yanktonaise band, and the more southern by the Yankton band of that nation, until cessions to the United States were made by the respective bands.

On the 29th day of April, A. D. 1868, the United States concluded a *treaty* with the different bands of the Sioux, including the Yanktonaise band, and ratified and confirmed the same on the 16th day of February, A. D. 1869. 15 U. S. Statutes, 647. By the second article of that treaty, page 636, the Indians, parties thereto, "henceforth \* \* \* re-

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linquish all claims or right in and to any portion of the United States or territories, except such as is embraced within the limits" in said article described, and except as therein after provided.

The portion of the territory embraced within the limits in said article specified, was all between low water mark on the east bank of the Missouri River and the one hundred and fourth meridian west from Greenwich, and the north line of Nebraska and the forty-sixth parallel of north latitude. The exceptions in the cessions referred to in article two are found in articles eleven and sixteen of said treaty. The modification of the general cession of territory in article two made by article eleven is simply a reserved right of the Indians to hunt on any lands north of the North Platte River, which includes the country between the one hundred and fourth meridian on the east and the summit of the Big Horn Mountains on the west, and the North Platte River on the south, and the country occupied by the Crows on the north; and also the right to hunt in Southern Nebraska and Northern Kansas on the Republican Fork of the Smoky Hill River. Article sixteen refers exclusively to the territory above described between the one hundred and fourth meridian and the summit of the Big Horn Mountains. The military posts then established in the territory in this article named were the military posts of Fort Reno, Fort Phil Kearney and Fort C. F. Smith. Indeed it was the establishment of these posts and opening the road to them and by them to the settlements in Montana by the United States, that the Sioux nation complained of most loudly, and to which the attention of both contracting parties was most earnestly directed.

From an examination of the said treaty it appears clear, that all the lands occupied or claimed by any portion of the Sioux or Dakota Nation of Indians who were parties to the treaty, situated east of the Missouri River were therein ceded to the United States. This cession included the lands and territory on which the plaintiff's store was situated, from which the defendants took and carried away the said goods.

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And this phase of the case presents the naked question, whether all that part of the United States "west of the Mississippi and not within the States of Missouri, Louisiana or Arkansas" is for the purpose of the Non-Intercourse Act of 1834 and amendments, to be taken and deemed to be Indian country, notwithstanding it may, since the passage of the act, have been voluntarily ceded by the Indians then occupying the same, to the United States. The purpose and effect of the Non-Intercourse Act of 1834, was to declare and proclaim what was then Indian country—country in which the manners, customs and laws of the Indian tribes prevailed, and in which the United States should protect them in all their natural and guaranteed rights. It was not the purpose to declare or maintain that to be Indian country which was not in fact in the occupation and under the control of the Indians. At no time in its history has the United States Government surrendered any portion of its territory over which it had once extended absolute jurisdiction, and which had been occupied by its own citizens. The policy of all branches of the government from the earliest times, has been to protect all citizens in the occupation of ceded Indian country, and to secure cessions as fast as demanded by the increase of our own population, by fair and large compensations paid to the Indians. And when territory has once been solemnly ceded by the Indians to the United States, it has never afterwards, so far as we can learn, been considered or treated as Indian country for any purpose. On the other hand these cessions by treaty, duly proclaimed by the President have always been considered and treated by the people of the United States, as an invitation from the executive department to all people to come, open and possess the ceded country.

In pursuance of a published treaty ceding the country to the United States, the plaintiffs in common with large numbers of our people came into the country between the James and Missouri rivers, and entered upon the ordinary avocations of our citizens.

After the ratification of the treaty of 1868, this country was no longer Indian country. The Non-Intercourse Act of 1834,

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wherein it fixed and determined the limits of the Indian country, at that time was modified and changed by the treaty between the United States and the Dakota Nation of Indians made in 1868 as it had been by various other treaties preceding this last; and the country in which the plaintiff's goods were seized, as alleged in the complaint and admitted in the answer, was not and had not been since the ratification of the treaty of 1868, Indian country.

The law as to the Indian country had been modified by a subsequent treaty. The *Cherokee Tobacco case*, 11 Wallace, 621; *Foster and Elam v. Neilson*, 2 Peters, 314.

The defendants admit that the instructions given by the court below as to the question of damages is correct as a general rule, but claim that the rule was not applicable to, and tended to mislead the jury in the case at bar. However good the intentions and purposes of the defendants may in fact have been—if we are right in our view of the law as above expressed—they committed against the plaintiffs a willful and unlawful act, from which flowed all the damages they sustained. The suing out of process, and the delivery of the goods to the officer having it, is part of the same transaction, and, in the eye of the law, willfully set on foot and consummated by the defendants against the plaintiffs. The defendants, in our view of the case, wrongfully and unlawfully seized and carried away the plaintiff's goods and property. They falsely represented to a proper officer that they had properly taken them, that they were subject to seizure and condemnation, and did thereby induce such officer to take out process and take these same goods off their hands. The officer, as soon as he became correctly informed and advised of the facts, returned the goods to the plaintiffs. Upon this state of facts, we have no doubt that the plaintiffs are entitled to recover from the original trespassers the difference in the value of the goods when and where taken and the value of the goods when and where returned.

All the damages are unquestionably the result of the unlawful acts of the defendants and such as would reasonably

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Clark, et al vs. Bates, et al.

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be expected to follow such acts, and ought not to be apportioned or qualified.

All the damages and injury were a part of the chain of effects resulting from these acts, and the defendants, if liable at all, are liable at least for the damages actually sustained by the plaintiffs from these unlawful acts as naturally flowing therefrom.

We are satisfied that the rule as to what may be shown in mitigation of actual damages sustained in actions of trespass should be limited to evidence of actual benefits received by the plaintiffs, after the trespass, from the property taken. Under this rule, if after property has been taken in trespass from the owner, an execution against him is levied thereon and the property sold, and a judgment against the owner thereby satisfied, this we think could and ought to be shown in mitigation of damages: So if the whole or a part of the property has been returned to the plaintiff before trial, etc.; but this rule has been doubted, and able jurists have held that no application of the property without the owner's consent would be available in mitigation of damages. *Hammer v. Wilsey*, 17 Wend., 91; but we think the law will presume the assent of the owner to such application of the property as is for his benefit to the extent of such benefit.

But where as in this case the verdict is only for the actual damages sustained after deducting all benefits derived by the plaintiffs from the return of some portion of the goods, it was incompetent to show in mitigation of damages, that after the trespass was committed and before the goods were returned they were in the custody of the law, under and by virtue of process, for the purpose of enabling the jury to deduct from the aggregate damage, the damage done the goods while in such custody. And if under the old practice a portion of the damages only could have been proved and recovered in an action *vi et armis*, and another portion only in an action of *trespass on the case*, still, under our *code*, all may be shown and recovered under the complaint stating the simple facts. All distinction in the old forms having been abolished, all may be recovered that flowed from the original

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trespass. The original trespassers must respond to the extent of the damages. Greenleaf on Evidence, Vol. 2, Redfield's edition, 1868, page 550, and notes and authorities there cited; Sedgwick on the Measure of Damages, 5th edition, 615, 617, 618, Note 1, and authorities.

We find no error in the record. The judgment below is

**AFFIRMED.\***

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JANUARY TERM, 1875.

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PRESENT:

HON. PETER C. SHANNON, CHIEF JUSTICE.

HON. JEFFERSON P. KIDDER, }  
 HON. ALANSON H. BARNES, } ASSOCIATE JUSTICES.

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*Farmers' National Bank of Salem v. Rasmussen.*

1. **ATTORNEY'S FEES:** LIQUIDATION. A stipulation in a promissory note for the payment of a certain sum as attorney's fees if suit is commenced thereon, is valid, and may be enforced in an action on the note.

*Appeal from Clay County District Court.*

THE facts sufficiently appear from the opinion.

*J. L. Jolley*, for appellant.

*Bartlett Tripp*, for appellee.

KIDDER, J.—This case comes here on an appeal from the District Court in Clay county, where the same was instituted by the plaintiff upon a promissory note, made and executed

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\*Appealed to and affirmed by the Supreme Court of the United States, December, 1877.



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by the defendant to one Ransom Bartle or bearer, and transferred by said Bartle through sundry parties to this plaintiff, the owner and holder thereof at the commencement of this action.

The note is in the ordinary form but contains, after the promise to pay the amount and interest therein named, these words: "and ten dollars attorney's fees if action is commenced hereon."

The complaint sets out the note at length and declares upon it in two causes of action—one for the amount of the note and interest, and the other for the ten dollars attorney's fees. The defendant, in his answer, denies generally the first cause of action, and to the second cause he interposes a general demurrer, that the complaint does not state facts sufficient to constitute a cause of action, in which demurrer the plaintiff joins, and upon such issue joined, judgment was rendered in the court below overruling the demurrer, from which judgment the defendant appealed to this court.

The defendant submitted no brief in the case but orally contended, that the contract was usurious and was further in violation of the provisions of the Civil Code of this Territory, and cited the Statute of 1865-6, § 1842; the N. Y. Code upon this subject in Waite's Law and Practice; 2 Abb. N. Y. Dig., 50, § 367. Other objections were made which we do not deem necessary to notice in this decision.

The practice has become a very common one in the western states, at the present time, to stipulate in notes and mortgages for reasonable attorney's fees in case an action shall be commenced thereon; and the question has been raised in many of the states, and so far as we have been able to examine the decisions, the courts have held that such a clause is in no sense usurious and does not destroy the negotiability of the instrument. In *Steneman v. Pyle*, 35 Ind., 103, the court says: "A stipulation in a note for the payment of attorney's fees, should a suit be instituted thereon, will not destroy the commercial character of the instrument." In *Nickerson v. Sheldon*, 33 Ills., 372, wherein this question came up, the Judge says: "The clause, 'We further agree, that

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if the above note is not paid without suit, to pay ten dollars in addition to the above for attorney's fees,' does not destroy the negotiability of the note.'” The same doctrine has been held in Louisiana and Iowa in late cases cited in the last American Edition. Byles on Bills, 32, note; *vide* 3 Iowa, 144; 28 do., 220; 29 do., 120, and 184, 244; 30 do., 131; also 32 do., 445.

These cases are decisive of the questions involved in this, unless our statute has given a construction to such contracts that the court is not at liberty to depart from. Section 829 of the Civil Code of 1865-6, provides: “Penalties imposed by contract for any non-performance thereof, are void.” \* \* \* This contract plainly does not come within this section, for the stipulation in this note to pay ten dollars attorney's fees if action is commenced thereon, at most, can be construed to be only an agreement for liquidated damages upon default and in event of suit commenced. Section 830, reads: “Every contract, by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided by the next section.” The next section referred to, section 831, is as follows: “The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.” The language of this statute is strong and is intended to make void the usual penalties appended to contracts for their violation. The statute is a peculiar one and we are not aware of any judicial construction given to it in this Territory. The whole code is intended rather to be itself a construction of the common law, than a statute to be construed by the courts—a compilation of the decisions of the common law courts. But giving to the statute the strictest construction that can be contended for, we see no reason why this case may not come within the provision of section 831, as one where “it would be impracticable or extremely difficult to fix the actual damage.” And, we are, therefore, of the opinion that the judgment of the court below should be

AFFIRMED.

SHANNON, C. J., dissenting.

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The People vs. Wintermute.

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## THE PEOPLE V. WINTERMUTE.

1. **STATUTES: REPEAL: EFFECT.** The repeal of a repealing act revives the statute originally repealed.
2. ———: ———: ———. The Criminal Code of 1862-3 was repealed by the Act of 1868-9, which was in turn repealed by the Act of 1872-3. *Held:* That the Code of 1862-3 was thereby revived, and its provisions governed in all criminal proceedings.
3. **GRAND JUROR: CHALLENGE: WHEN INTERPOSED.** Under a provision of the statute giving to a person held to answer a charge for a public offense, the right to challenge any individual grand juror, before the jury retires, after being sworn and charged, it is error in the court not to allow the challenge to be made as a matter of right, although no reason is shown why it was not interposed before.
4. ———: ———: **DISQUALIFICATION.** When a legal challenge is properly made to an individual grand juror, and the court refuses to entertain or consider such challenge, the juror against whom the same is made is disqualified, and his presence on the jury vitiates the whole panel.
5. ———: ———: **RIGHT OF CHALLENGE.** The refusal by the court to grant a challenge, legally interposed to a grand juror takes from the party entitled to interpose the same, one of the greatest safeguards guaranteed by law, deprives him of a substantial right, and vitiates all the proceedings.

*Writ of Error to the Yankton County District Court.*

THE defendant was indicted in the court below for the crime of murder, found guilty of manslaughter in the first degree, and sentenced to the Territorial prison for the term or period of ten years. Motions in arrest of judgment and for a new trial were made and overruled, and the cause was removed to this court by writ of error.

*Leonard Sweet, G. C. Moody, Bartlett Tripp and S. L. Spink,*  
for defendant.

*J. R. Gamble, District Attorney, and Jason Brown,* for the People.

KIDDER, J.—The above cause comes before this court from the county of Yankton upon *writ of error*. Several questions arising upon the motion for a new trial and arrest of judg-

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ment were presented, but as we regard the *motion in arrest* decisive of the case, that question will only be considered.

The Statute of 1862-3, Criminal Code, 107, § 13, provides that, "*a person held to answer a charge for a public offense, may challenge the panel of the grand jury, or any individual grand juror, before they retire, after being drawn and charged by the court.*"

Among the causes for individual challenge, the act embraces the following: Section 15, Sub. Div. 6, "That a state of mind exists on his part in reference to the case, or to either party, which satisfies the court in the exercise of sound discretion, that he cannot act impartially and without prejudice to the substantive rights of the party challenging."

After the grand jury in the present case had been impanelled, charge and sworn, and before they retired, Peter P. Wintermute, this defendant, "who was then held to answer a charge for a public offense" before that body, challenged an individual member thereof in accordance with the permission and for the cause specified in sub-division *six* above quoted.

The court disallowed the challenge upon the ground that the Statute of 1862-3 had been repealed by subsequent territorial legislation, and was not in force. That the presence of a disqualified grand juror vitiates the whole panel is well settled by numerous authorities, among which are the following: 1 Bish. Crim. Pro., § 884; *Commonwealth v. Cheny*, 2 Virg. Ca., 20; 1 Ch. C. L., 307-8-9; 2 Hawk. Cr. Ch., 25, § 16; *Barney v. State*, 2 S. & M., 68; *Portis v. State*, 23 Miss., 578; *Stokes v. States*, 24 Miss., 621; *Miller v. State*, 33 Miss., 356; *State v. Symonds*, 36 Me., 128; *State v. Lightbody*, 38 Me., 200.

The grand jury impanelled and the challenge thus denied, that body returned to consider whatever presentments might be made. Subsequently it indicted the defendant, thus held to answer, for murder; and afterwards he was tried and convicted in the District Court in the county of Yankton for *manslaughter*.

If, therefore, the Statute of 1862-3 was *not* then in force, the court below, by its rulings, so far as the same are presented by the motion in arrest, gave to the defendant all the rights

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to which he was entitled. If that statute *was then* in force, the right to challenge a juror for partiality and a condition of mind prejudicial to the substantive rights of the defendant was denied.

The present legal *status* of the law of 1862-3, and the place it should hold in the jurisprudence of this Territory, are the only questions we need discuss. If the law was not in force the motion in arrest should be overruled. If it was in force the judgment must be arrested.

The history of the legislation in this Territory which relates to the questions we are discussing, is this: The Act of 1862-3 was repealed by the Act of 1868-9, page 165, Sec. 799. That of 1868-9 was repealed by the Act of 1872-3, page 23, chapter 5. Section 1, of the Act of 1872-3 provides, "That chapter first of the laws of 1868-9, entitled 'An act to establish a Code of Criminal Procedure for Dakota Territory,' approved January 12th, 1869, be and the same is hereby repealed."

Is then the Statute of 1862-3 revived by repealing that of 1868-9, which repealed the former?

The principle of law, that the repeal of the repealing act revives the statute originally repealed, has been too often adjudicated and the principle is too well established to require elaboration or a lengthy citation of authorities.\*

Blackstone, says: (Vol. 1, page 90) "If a statute that repeals another, is itself repealed afterwards, the first statute is hereby revived, without any formal words for that purpose." The same rule is laid down in *Potter's Dwarris* on Statutes, 159; in *Tattle v. Gimwood*, 3 Bing., 493; in *Commonwealth v. Churchill*, 2 Met., 118. This general principle may be found almost anywhere where the subject is discussed, and was not denied, as we understand, by the counsel who represented the People in the argument of this case.

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\*Since this opinion was announced this rule has been abrogated by Section 2132, Civil Code, which provides: "Whenever any act of the Legislative Assembly is repealed, which repealed a former act, such former act shall not thereby be revived, unless it shall be expressly so provided."

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Indeed, the rule extends further than is necessary in its application to this case. "If a repealing statute, and a part of the original statute, be repealed by a subsequent act, the residue of the original statute is revived." 9 B. and C., 354; if an act of parliament be revived, all acts explanatory of that so revived, are revived also; 2 Burr, 747.

The denial of the legal force of the statute of 1862-3, was based upon other reasons which we will proceed to consider.

Section 2 of the Act of 1872-3 provides, "That from and after the passage and approval of this act, the proceedings, practice and pleadings in the District Courts of this Territory, in criminal cases, shall be in accordance with the proceedings, practice and pleadings of the common law, *except where the same is otherwise expressly regulated by law.*"

It was contended on behalf of the People, that this section qualified the unlimited repeal of the Act of 1868-9, fixed by the first section, and introduced the common law as a rule of practice in lieu of all statute law. In other words, it is contended that these words manifest an intention in the legislature not to revive the Act of 1862-3, but to adopt the common law in lieu of it.

Such is not the meaning of this section. In construing a statute, all the elementary writers say, it must if possible be so construed as to give an intelligent meaning to *all* the words of such statute, and any construction which necessitates the rejection, or which renders meaningless some words, and especially words to which some obvious meaning was intended, is presumptively erroneous.

When the legislature adopted the common law as the rule of practice in this Territory, "*except where the same is otherwise expressly regulated by law,*" it obviously meant something by these words, and so to construe the act as to render such words meaningless is a violation of the plainest principles of legal construction, whether of statutes or any other documents.

An examination of the criminal statutes of the Territory show, that *if* these words—*except where the same is otherwise expressly regulated by law*—do not refer to the Act of 1862-3,

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as where matters of criminal practice are "regulated by law," they refer to nothing.

The first Act of Criminal Procedure passed in the Territory, was that of 1862-3. The second was that of 1868-9. Now the repeal of the Act of 1868-9 by that of 1872-3, left nothing *but the Act of 1862-3*, to which the expression quoted above could refer. Hence, we hold that these words are not meaningless, but do refer to the Act of 1862-3; and that the intention of the legislature was to incorporate the common law upon that act, and thus by the act and the common law to create a harmonious system in which the common law should constitute the ground work, and the statute specific directions in matters of criminal procedure. It is well understood by the profession in the Territory, that this statute (the one of 1862-3) was not full, *i. e.*, its provisions did not meet every emergency; therefore, the legislature could see the necessity of commingling its provisions with the common law.

The theory that the common law *alone* should be a rule of procedure seems to us unreasonable. The Common Law of England was so modified by English statutes, that at this day, to sever it and bring it to a new country and apply it without more modern machinery, is practically an impossibility. On the contrary, to receive it in connection with special statutes, is in accordance with the principles of the American system, and the principles of our jurisprudence.

It is not the duty of the court, therefore, to strike out the common law and act alone upon the statutes of the Territory, and go back to the common law alone, but to weave our statutes and the common law into one uniform texture of jurisprudence, thus construing the statutes in harmony with our modern policy and with the common law, and not adopting either to the exclusion of the other.

The next point of objection to the legal authority of the Act of 1862-3, and the doctrine of a revival of a repealed statute by the repeal of the repealing act, arises from an Act of Congress which it is contended bears upon this question; *vide* 16 U. S. Statutes at Large, 431. The section of the act relied upon is as follows:

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Section 3. "*And be it further enacted*, That whenever an act shall be repealed, which repealed a former act, such former act shall not thereby be revived, unless it shall be expressly so provided."

This section is from the Act of February 25th, 1871, and is claimed as a rule of legislation, or legislative construction within this Territory.

The power making this section operative within the Territory, is claimed to be found in the following provision of the Organic Act, section 16: "That the Constitution and all laws of the United States which are not locally inapplicable shall have the same force and effect within the said Territory of Dakota as elsewhere within the United States."

The question under these sections is: does the Act of Congress obtain force within the Territory so as to control legislative action? In deciding this question we must look to the *title* and *body* of the act to discover its scope and intention. Such examination shows conclusively that this act, not only has no binding force within the Territory, but was never intended to have.

The *caption* of the act is, "An act prescribing the form of the enacting and resolving clauses of *acts and resolutions of Congress*, and rules for the construction thereof."

The very purpose of the Act by Congress, as plainly expressed by the enacting power, is to furnish rules of construction for *themselves*, and the words of the clause fixes the definite limitation.

"Though the title of an act," says the author of the notes in Dwarris, 102, cannot control the plain words in the body of the statute, yet, taken with other parts, it may assist in removing ambiguities. The *intention* of the law makers, it has always been held, is the best guide for the construction of statutes.

The body of the act is in harmony with the enacting clause. It gives the form of the enacting words of a *Congressional* law or resolution, and the definition of various words which may be used therein; and then comes the section cited above as to repealing acts, and the law of construction, which, by this section, Congress adopted for *itself*.



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Another rule of construction always acknowledged and acted upon, is that in determining the meaning of a law or the intention of a law maker, the evil sought to be remedied should be considered.

Congress has been enacting statutes now for nearly a century. It would, therefore, be impossible to retain in mind all the repealed acts which the repeal of the repealing acts might revive. It was, therefore, perhaps wise to establish the rule that no repealed act should be revived except by express words. However this might have been for Congress, the reason has no force within the Territory where the statutes are limited to a few years and could easily be called to mind.

But the controlling reason upon this question lies in the fact, that by the Organic Act, section 6, it is provided: That "the legislative power of this Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the provisions of this act."

This act gives to the legislature complete control of the question of legislation subject to the limitation therein named. In reference to the manner in which laws shall be enacted, or in which they shall be repealed, whether it shall be by direct words, or by implication, or repugnancy, no rule is laid down. And can it be contended, that some ten years after the Organic Act was passed, after the legislature had always acted without limit under it, that a rule expressly made for Congress itself, operates to modify or limit that Organic Act? and, therefore, laws must be passed and repealed, or revived in the Territory, just as they are passed, revived, or repealed by Congress?

Let us reverse this proposition: In the act referred to, Congress provides how *it* will enact laws, what captions, titles, etc., it will have, and how it will repeal them. Would it be contended for a moment, that if a Territorial law, duly passed, did not have the same form of heading or caption that a law of Congress has, it would be void? and, yet, this reasoning is as forcible as to the form of enacting clauses as it is to the form of repeal.

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Enacting criminal procedure, is one of the "rightful subjects of legislation" in this Territory, and if Congress intended to establish a rule which would control Territorial legislation, it seems to us that it would, as it has often done heretofore, have made its provisions in the statute above referred to—in express terms—applicable thereto.

We are, therefore, of opinion, that this law of Congress does not, and never was intended to operate within the territories, and that it has no bearing upon the question at issue.

From the above reasoning and authorities, we hold that the Statute of 1862-3, under which the said challenge was made, was then and there in force, that the refusal to grant the challenge asked for, took from the defendant one of the greatest safeguards guaranteed by law, and hence the judgment in this case must be arrested.

In this opinion the court expressly declines to decide, or give any intimation as to the effect of the past proceedings upon a future prosecution. It orders the defendant into custody to answer to any indictment which may be found, reserving all questions arising upon any new indictment for future adjudication.

CHIEF JUSTICE SHANNON, DISSENTING: I dissent from the opinion filed by Mr. Justice Kidder, and from the judgment which the majority of the court have thought it proper to render in this case.

They declare they have discovered one error, "decisive in the case," and for this alone they arrest the judgment, reverse the entire proceedings, and hold the accused to await a new indictment. And, it must be borne in mind, this solitary error has relation to nothing that occurred during the progress of the trial before the jury (a trial that lasted over twenty days)—to nothing in regard to the formation of the petit jury itself—to nothing in the admission or rejection of evidence—nor to anything in the body of the charge to the jury, or in the responses of the court to the fifteen complicated and voluminous requests, or propositions of law, offered by the counsel for the defense.

To reach this alleged error, it seems to have been deemed proper and necessary to go back of all matters involving the merits, to overlook all that transpired during the trial, and not even to pause over the force and effect of the plea to the indictment. The plea in bar was an uncompelled, and a voluntary act, on the merits and traversing the facts. Prior to it, there had been no motion to set aside the indictment—no plea in abatement—no demurrer. What was, or was not, waived by these omissions and by the free choice of the plea of “not guilty,” appears not to have been considered.

The pith of the alleged error, consists, it is said, in an irregularity in the formation of the grand jury, by which irregularity the presence on the panel of a “*disqualified grand juror*” was brought about.

Here at once arises the divergence of opinion; for I respectfully affirm that the grand jury was lawfully constituted, and that no “disqualified” person was a member of it.

Indeed, I think I may venture to go still further, and to affirm that no accused party in any known criminal action, ever had a fairer or fuller opportunity for asserting his legal rights upon the organization of a grand jury, than was accorded to this party. In fact, the majority of the court candidly admit that if the Statute of 1862-3 was not then in force, the court below, by its rulings, “*gave the defendant all the rights to which he was entitled.*” By which, of course, is meant that the court below, in the organization and in the challenging of the grand jury, accorded to the accused all the rights, and afforded to him all the opportunities, to *which he was entitled by the common law*. In the interests of justice and the due administration of law, this broad concession is of the highest value and most significant importance. And whether that statute was, or was not, in force, it follows by the irresistible strength of logic and reason, that if those sections of that code which relate to the challenging of jurors, were merely declaratory of the common law, conferring no new right and entitling the defendant to no privileges which he would not have enjoyed at common law, then there is an end to all doubt or question, and the court below did, there-

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fore, extend to the defendant all his legal rights in the premises. But as this point will be hereafter considered, I shall pass it by for the present.

The first question that naturally arises and that should be examined, is: had the defendant a fair opportunity allowed him, according to law, to exercise his right of challenging the individual grand juror, George W. Delamater? This is the precise and only point in the case. The defendant complained that he had not, and the majority of this court sustained his view of the matter. Without stopping here to inquire whether or not the objection was properly on the record, or at all a part of it, under well-known rules, and in order to a correct and thorough understanding of the subject, I consider it proper (even at the expense of being considered prolix) to adduce the record, so that it may answer. It discloses the following facts:

Peter P. Wintermute being under arrest, charged with the killing of Gen. McCook, was, on the 5th of March, 1874, set at liberty, by being admitted to bail to appear at the next April term, to answer to such indictment therefor as might be found against him. On the 4th of April, in pursuance of an order to that effect, the officers appointed by law duly drew the names of the sixteen grand jurors; and the venire was, on the same day, placed in the hands of the sheriff. Among the names drawn and in the venire, was that of George W. Delamater, a well-known citizen of Yankton. The venire was returnable to the 16th of April, 1874. It thus appears that from the 4th until the 16th of that month, the accused had knowledge, from the public records, of the names of all the grand jurors; and he consequently had abundant time and opportunity to make all requisite inquiries as to the character, competency, and impartiality of the citizens who were to compose the grand inquest, and more especially with reference to Mr. Delamater, a resident of his own city. On the 16th day of April, the sheriff having made return of said venire, the names of the grand jurors served (fifteen) were publicly called in open court, and they appeared and took seats. Among them, was George W. Delamater. The de-

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fendant and at least three of his counsel were present, and so continued during the whole proceedings of that day. Four of the fifteen in the box, for satisfactory reasons publicly shown, and entered of record, were excused from further attendance, Mr. Delamater remaining. There being then only eleven persons in the box, the court, in pursuance of law, ordered the sheriff to summons, not from the by-standers, but from the body of the county, five good and lawful men, having the qualifications of jurors, to complete the panel, etc. To this special venire, the sheriff made due return, and the five persons thus summoned took seats in the box, making the required number.

The record next shows that the said sixteen persons were then duly *sworn to make true answers touching their qualifications to sit as grand jurors*.

Thereupon a controversy having arisen as to the competency of Matthias Bagstadt, the counsel for the defendant drew up and presented to the court, the following paper, which was duly filed:

"Now at this time, sixteen persons having appeared and taken seats in the box as grand jurors of the county of Yankton, comes the defendant, P. P. Wintermute, a person held to answer to any indictment that may be found against him at this term of the court, in person and by his counsel, and also comes the District Attorney for said Yankton county, and one Matthias Bagstadt having been selected, drawn, and summoned upon the regular panel as a grand juror, being sworn on his *voir dire* answers as to his qualifications, that," etc. \* \* \* "Upon such answer the District Attorney asks that said Bagstadt be excluded from serving as such grand juror, alleging that he is not competent to serve; to which said Wintermute objects, and insists said Bagstadt is a competent grand juror of this court." The court excluded Mr. Bagstadt, to which ruling the defendant excepted, the District Attorney declaring, however, that no such exception would lie.

The next step in the proceedings was an order to summon one good and lawful person as aforesaid, to supply the vacant

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place. The sheriff made return that he had summoned N. Presho, who appearing, was duly sworn as to his qualifications; and there being no objection made, he was allowed to take a seat in the box. "The court then announced that "there being sixteen persons in the box (the requisite number) the panel of the grand jury is complete; and the court "asked if there are any objections of any nature to be made, "why the said sixteen persons should not be sworn in chief "as a lawful grand jury. Immediately thereupon comes the "said Peter P. Wintermute and presents this his challenge "to the array, and moves to set aside the grand jury summoned and impanelled at this said April term, for the reasons," etc. After hearing and argument, this motion was overruled and the challenge disallowed. "Same day, comes "the said Peter P. Wintermute and interposes another challenge to the array and moves to set aside the panel of grand jurors upon the ground," etc., setting forth other reasons. This was also refused, and the ruling likewise noted. "The "court then again publicly inquired if there were any further "objections of any kind or nature, why the said sixteen persons now in the box, should not be sworn in chief as the "lawful grand jury of said county; and there being no objection raised or challenges made, but both the counsel of "the said Wintermute (he being then also present in court) "and the District Attorney, *stating that they had no objections*, at 4½ o'clock, p. m., of said day, the court appoints "George W. Delamater as foreman of said grand jury, and "said foreman was duly sworn according to law. And after "said oath was administered to said foreman, the remainder "of said panel of grand jurors were duly sworn according to "law, by *permission of the said District Attorney and the said defendant and his attorneys.*"

In view of these details extracted from the minutes, or journal, of the court below, and which were spread out at length on the record before this court, how can it, with any propriety, be asserted that this accused party was denied, or deprived of, any of his rights? On the contrary, it is manifest that very unusual precautions, joined with most scrupulous

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care, were taken to guard those rights. Attended by vigilant counsel, he had his whole day in court. The jurors had all been sworn to make true answers as to their qualifications, and competency to serve. The door of inquiry was thrown widely and invitingly open. Twice did the court publicly call on him to interpose any challenges or objections, of any kind or nature, which he might think proper to make, thereby notifying and warning him that that was the proper time to exercise the right to challenge. He and his legal advisers were active and busy in the premises, in all matters appertaining to his interests. Not himself alone, but his counsel, by these repeated notifications, were informed by the court that if they knew of any valid objection and intended to challenge, the objection must be raised and the challenge taken before the jury were sworn. It was thus more than suggested to their intelligence that if knowing a cause of challenge and it was not then taken, it must be afterward viewed as a waiver. The sixteen persons as an array, and each individual of them, were tendered to the defendant, to inquire into the nature and cause of the accusation against him. He voluntarily accepted them, and with them George W. Delamater; for the record shows that he publicly stated he had no objections, beyond those he had made, and that the panel was sworn by his permission. Finally, when Mr. Delamater was chosen as foreman, and was called to stand up to be separately sworn, no challenge to him (thus made conspicuous) was interposed. He was solemnly sworn, in the presence of the defendant, that as foreman he would not present him or any person "through malice, hatred or ill will," but according to "the truth, the whole truth, and nothing but the truth," and thus impliedly averring that he had neither malice, nor hatred, nor ill will against the accused. When impanelled and sworn they became, and were pronounced to be, the lawfully constituted grand inquest of the county. A species of judgment to that effect was rendered, when the record was made up. And when the court delivered its charge to them, it was a public judicial recognition and declaration of that fact, to-wit: of its official existence as an

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appendage of the court. When once created a lawful body, it was to remain such until dissolved or broken, in some manner pointed out and allowed by law. No caprice of the Judge, no bare assertion, or *ipse dixit* of any man, could be sufficient to undo that which was thus lawfully done. To take away any of its members, or in any manner to disintegrate it, was a thing beyond the power of the court; unless, in the exercise of a sound discretion, upon some evidence, and for some good cause shown.

We now approach the eventful point in the case. It appears that, on the next day, the 17th of April, counsel for the defendant proposed to challenge Mr. Delamater, upon a general statement and broad assumption of bias—namely, that the said juror “cannot act impartially and without prejudice.” The offer was supported by no affidavit alleging surprise or mistake, or excusatory of delay, omission, or default. In courts of law when a party is in default, he must ordinarily make some proof to open it, in order to be restored to the position he before occupied. But here there was not a scintilla of evidence of that or any other kind. It was not stated that a cause of challenge, unknown the day before, had been newly discovered. In fine, the offer was unaccompanied by any reason or excuse, or by the shadow of either, why the court should, at that day, and under those circumstances, undertake, in the face of objection, to break up and disorganize the grand inquest.

Moreover, the offer, as presented to the consideration of the court below and of this court, had not even the support of an affidavit of the defendant that he believed, or had cause to believe, or had been informed, the juror *was* partial or prejudiced. And in no portion of the proceedings, at any stage afterward, does the oath of anybody appear averring partiality, prejudice, or other unfitness, of that juror. In the position then occupied by Mr. Delamater, and in view of the solemn oath he had taken the day before, this was a grave charge against his honor and reputation, and tending to his infamy; and consequently no court of justice, mindful of its duties and of the law, could, for an instant, think of tolera-



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ting such an accusation upon naked, idle assertion. To be then heard, it should have been verified. The court, before the final impanelling, had been satisfied that he could act impartially and without prejudice to the rights of the defendant. It had then exercised all the legal discretion reposed in it, under the existing circumstances.

Here it may be as well to observe that, in the opinion of the majority of this court, it is considered that Mr. Delamater was "a disqualified grand juror," whose presence vitiated the whole panel. But how was he disqualified? Upon what part of the record does this appear, or how was it shown? Did the bald assertion of the defendant, on the 17th, make him so? Manifestly, it did not; and if not, how else was the alleged disqualification made to appear? It must not be forgotten that by all the presumptions of law he was qualified, and that no mere random declamation could render him otherwise.

But again: the offer was, at best, but a loose, vague generality. It contained no specification of the particular cause, or facts, from which the alleged impartiality, or prejudice, was to be inferred. It did not state that the juror had formed or expressed an opinion as to the guilt of the accused. It did not assert personal enmity or hostility, or that an action, implying malice or displeasure, was pending between the juror and the defendant, or that the cause had happened since he was sworn.

It is also observable that the court in overruling the offer in the shape in which it was presented, pointed out its prominent defects, and thereby plainly signified how a renewed offer might have been shaped. The court in overruling the offer, among other things, said: "This offer to challenge is made the day after the impanelling, organizing, and swearing of the grand jury. No cause is assigned or shown for this delay. \* \* \* The proper time to object to the competency of this juror, would have been on yesterday, and before he was sworn. Then there was abundant opportunity for such purpose. \* \* \* This offer does not declare any newly discovered information as to this juror;

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“it pre-supposes that what is stated to-day, at this late hour  
“of the proceedings, was known yesterday, before the juror  
“was sworn.”

Here were at least two things about which the court desired to be satisfied; first, the reason for the delay and default; secondly, whether the alleged cause of challenge was, or was not, discovered after the swearing of the juror? Was this unreasonable? Or rather was it not the duty of the court to inquire into them? But no response was made. The defendant and his counsel stood mute. After such notice as the above, that no renewed offer was made, affords strong presumption either of the incorrectness of the first allegation and its abandonment, or of an inability to comply with the requirements of law.

It is quite true the court at the same time remarked that it had “heretofore decided that the Code of Criminal Procedure of 1862-3, is not in force,” etc. But it is a very grave misapprehension to assert that the court disallowed the challenge solely upon the ground of the repeal of that statute. The offer to challenge, in the shape, and under the circumstances, in which it was presented, was refused because the court, under objection made, considered it improper and unlawful to receive it. And this is the very question—no matter what remarks, whether correct or incorrect, the court may have made at the moment. The precise question was whether the immemorial and then existing law, as binding on the court itself as it was on parties, that after the jury is sworn it is too late to take or to allow a challenge, except for good cause shown, was to be treated as if it had no place in our jurisprudence, or if so, whether it should be tossed aside at anybody’s whim or suggestion.

This was the point squarely brought before this court, and the majority concede (to again refer to their own language) that—“if, therefore, the Statute of 1862-3 was not then in force, the court below, by its rulings, so far as the same are presented by the motion in arrest, gave the defendant all the rights to which he was entitled.” But contrary to their further views, I also affirm that if that statute was then in force,

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the defendant was, nevertheless, accorded all the rights to which he was entitled, under a true interpretation of that statute. And first as to the above concession. It means that according to the procedure, practice, and pleadings at common law, as assimilated to the procedure, practice, and pleadings on the Federal side of these Territorial courts, there was no error. To fully understand this, and the positions that are to follow, let me adduce some of the authorities at hand.

In Bacon's Ab., Vol. 5, page 365, is the following: "It is laid down as a rule, that no juror can be challenged without consent after he hath been sworn, either in a criminal or civil case, \* \* \* unless it be for some cause which happened since he was sworn." "The jurors must be challenged, if at all, before they are sworn, or the oath of affirmation tendered to them." 2 Hawk., C. 43. § 1. In 1 Archbold, 554, in quoting Coke, Hawkins, and Chitty, it is said—"this last author maintains that the proper time for challenging, is between the appearance and the swearing of the jurors. And this seems to be the true doctrine. The challenge of a juror must be before the oath is commenced." Wharton states that after the grand jury is assembled, the first thing, *if no challenges are made*, or exceptions taken, is to select a foreman. In the case of *Mima Queen*, 7 Crauch, 297, C. J. Marshall (as to an objection to the qualifications of one of the jurors, made after the juror was sworn) said—"whatever might have been the weight of this exception if taken in time, the court cannot sustain it now. The exception ought to have been made before the juror was sworn." "The grand jury as sworn is always presumed to be competent, unless the contrary appear." 2 Hale's P. C., 162. Bishop on Criminal Procedure says—"if parties choose to have their cause tried by prejudiced or otherwise incompetent jurors, who are tendered to them according to the forms of law, they can do so; and if they know of the cause of challenge, and do not take it *at the proper time* while the jury is being impanelled, they cannot avail themselves of the defect afterward. If a party declines to take an objection while the jury is being impanelled and sworn for the cause, he cannot ordinarily take it afterward." In *Reg. v. Frost*, 9

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Car. & P., it was laid down that the challenge of a juror, either by the Crown or by the prisoner, must be before the oath is commenced, and the moment the oath is begun it is too late. This, says Bishop, may also be deemed, in substance, the American doctrine. In 3 Wendell, 314, *The People v. Jewett*, the practice at common law was stated by Ch. J. Savage to be, that causes of challenge to grand jurors, "to be availing, *must be made previous to the juror being impanelled and sworn.*" And said Marcy, J., in the same case—"it is not so vitally important to persons accused that grand jurors should be beyond all exceptions, as that petit jurors should be so." In *Musick v. The People*, 40 Ills., 268, where the cause of challenge was that members of the grand jury had expressed the opinion that the accused was guilty of the charge, the practice at common law was also held to be, that "the objection should be taken, as in the case of a petit juror, before he has taken the oath. Otherwise great inconvenience and delay, if not an obstruction to the administration of justice, might ensue." And such was the rule adopted in the trial of Col. Burr. In the *Comm. v. Clark*, 2 Browne, Pa. R., 323, the challenge to the grand juror was made *before* the grand jury were sworn, contrary to the erroneous statement in the text of Mr. Wharton. So in the *Comm. v. Tucker*, 8 Mass., 286, the objection to the grand juror was taken before he was sworn. The time for a prisoner to make his challenge, is when the juror is tendered, and before he is sworn. *State v. Patrick*, 3 Jones, Law N. C. Where a juror can be challenged for cause, the right must be exercised before the juror is sworn. *State v. Bunker*, 14 La. An., 461; see also 23 Pa., 12. An omission to challenge at the proper time, is a waiver of all objection to a juror, in like manner as an omission to plead a defense is a waiver of the defense. 20 Bar., 278. In *Clark v. The Territory*, 1 Wash. Terr., 82, held—that on a trial for murder, a failure on the part of the defendant to ascertain the qualifications of a juror by putting him upon his oath prior to being impanelled, is a waiver of any objections on that ground. And so if the defendant know of the incompetency of the juror, and permit him to be sworn without challenging him. 5 Ind., 122; 7 Ind.,

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63; 15 *ibid.*, 347; 16 *ibid.*, 298; 2 Bld., 114. And if the defendant had full knowledge of a valid objection to the juror at the time he was impanelled and sworn, and does not object to him, this is tantamount to accepting the juror. *Barlow v. The State*, 2 Blackf., 114; *Lisle v. The State*, 6, Mo., 426. In *People v. Sanford*, 43 Cal., 31, the court say—"it was the duty of the defendant in the first place to have examined the juror as to his competency-at the time the jury was impanelled."

But it is useless further to multiply authorities. The almost universal rule at common law is, as stated in 40 Ills., to-wit: that the objection should be taken, as in the case of a petit juror, before the grand juror has taken the oath. If in the case of a petit juror who is to sit on "the jury of life and death," it is essential that a challenge, peremptory or for cause, must be taken before he is sworn, *a fortiori* must a challenge to a grand juror for cause, be made before he is sworn. For the grand juror does not try offenses, but only inquires into and presents them to the court by indictment. Hence the remark of Marcy, J., in the case in 3 Wend., quoted above. If such strictness is to be observed with regard to trial jurors, should not even greater exactness be required as to grand jurors? In fact, the actual existence of a cause of challenge to the latter, is generally considered of so little importance that in most cases it is not exercised.

Whilst it thus appears that the nearly universal rule is that it is too late after the jury is impanelled and sworn, to inquire into the impartiality or incompetency of a juror, yet if it be discovered subsequent to oath, that he is prejudiced or otherwise incompetent to serve, he may, for *good cause shown*, and in the exercise of a sound *discretion*, be set aside by the court. As to this permissive or discretionary power, Mr. Bishop says this—"but where the defect was unknown at the time, the courts will *permit* the party injured by it, to take advantage of it afterward, in some circumstances, and to an extent which no general statement can define. In *U. S. v. Morris*, 1 Curtis C. C., 23, it was held that although neither party has a right to challenge after a juror is sworn, yet that it is a motion within the discretion of the court. In Virginia it has been held

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that after a juror has been elected and sworn, the court *may*, if it please, as a matter of discretion, permit the prisoner to challenge him for cause. *Toel v. Commonwealth*, 11 Leigh, 714. So in *U. S. v. Blodgett*, 35 Ga., 336, it was said that challenges to members of the grand jury *may* be heard after the body has been fully organized, provided there is reasonable excuse for the delay. Also, in *The People v. Danon*, 13 Wend., 352, Ch. J. Savage held—"the regular practice is to challenge jurors as they come to the book to be sworn, and before they are sworn; but I apprehend this is a matter of practice, and may be departed from in the discretion of the court."

But enough has been quoted to show the tenor and force of the common law on the subject. It remains now to be seen in what essential particular the Statute of 1862-3 (assuming that it was and is in force) differs from the common law. What statute, as to the challenging of petit jurors declares that a challenge to the panel must be taken before a jury is sworn; that a challenge to an individual juror must be taken when the juror appears, and before he is sworn; but the court may, for good cause, permit it to be taken after the juror is sworn, and before the jury is completed. In relation to grand jurors, it gives a challenge to the panel for three specified causes, and a challenge to any individual grand juror for six enumerated causes, most of which may be taken by either party—that is to say, by either the prosecution or by the defendant. But it has also the following section: "A person held to answer a charge for a public offense, *may* challenge the panel of the grand jury, or any individual grand juror, before they retire, after being sworn and charged by the court." Now although this section seems to be a stumbling-block to the mental vision of the majority of this court, yet to my mind it is perfectly clear it is nothing but a substantial repetition of the permissive or discretionary power of the common law in the premises, as the same is accurately set forth in the other section relative to the proper time for challenging individual petit jurors. It is but a paraphrase of the other one, which itself embodies the common law exception. Both sections, with all the others relating to challenging, must be construed

together; and there is nothing in either of them imperative or mandatory. They are, as heretofore remarked, purely declaratory of the common law; and neither of them confers any new right, or entitles an accused party to any additional privileges. The right of challenge, as to the proper time for its exercise, is still limited to the period before the swearing of the juror; afterward, the right ceases, and it becomes a matter to be permitted, or not, as the court, in its discretion, for good cause shown, may see fit. But if the right exists afterward, as contemplated by this decision of the court, what is to compel a party to take his challenge beforehand? All order, regularity, and decorum would thus be subverted, and the due administration of justice would be clogged in the most fantastical and dangerous manner.

Any other construction than the one I have given—which is the natural and obvious one—would involve the monstrous absurdity and the solemn farce of forming, swearing, and charging the grand jury, before challenges to the panel and to its members would commence. The ancient, regular organization of the body of the inquest, with the charge of the Judge superadded, would be but the idle prelude to the testing of the competency of the individuals. The *voir dire*, losing its appropriate place, would be postponed to the oath in chief, and the whole meaningless process would be like to the building of an edifice only to tear it down. If some of the members should be set aside, and their places filled, the party might again wait until after a fresh swearing in chief, and another charge from the Judge, and then once more demand this so-called right. Or, in this manner, all might disappear, and a new body would have to be brought in, with the prospect of an infinite continuance of the same irrational, if not nonsensical, procedure. And the above, it is to be regretted, is not a fanciful, overdrawn picture of the absurdities to which the law as now laid down might lead; for it is of judicial cognizance that we have actually had in this Territory, such practical exemplification of the necessary outgrowth of this lame construction.

The reason of the law is the life of the law; and, without

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some reason for it, the meaning given to this Statute of 1862-3, by the majority of the court, would involve it in absurdity. And the rule is, that every interpretation that leads to an absurdity ought to be rejected. We must prefer the evident meaning of the whole law, to the inconsistent meaning of a defective expression. Every part of this statute must be viewed in connection with the whole, so as to make all its parts harmonize, and give a sensible and intelligent effect to each. If the words of one section are obscure, the intention may be found from other sections *in pari materia*, for every legislative act must have reasonable construction. In Minnesota, from which this statute appears to have been borrowed, Emmett C. J., in reviewing this identical section, declared "that the language of the statute is permissive only." 3 Minn., 444, *Maker v. The State*. Therefore, in conclusion of this branch of the subject—even if the Statute of 1862-3 was then in force, it is firmly maintained that, by the true interpretation of it, the defendant's *right* to challenge Mr. Delamater ceased when he was sworn in as foreman, and when the grand inquest was organized according to law, on the 16th of April. Also, that afterward, and on the 17th, it became a mere matter of practice, altogether permissive and discretionary on the part of the court, under all the circumstances. And further, that the court below was fully justified in exercising that discretion as it did, and that its action was not consequently properly reviewable in this court.

I dissent from the decision of the majority of this court for another reason, and shall proceed to state it. Going upon the assumption that the said statute was and is in force, I hold that the defendant by voluntarily pleading "not guilty" to the indictment, and by demanding to be tried "by the country" on the merits, became precluded from afterward taking this objection. It seems to have been forgotten by the majority of the court that this statute appoints and fixes a precise order and rule of pleading. It prescribes that when a defendant is arraigned, "he may in answer to the arraignment either (1) move the court to set aside the indictment, "or (2) may demur, or (3) plead thereto." And first as to the



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motion to set aside the indictment; it declares that the indictment must be set aside by the court, in which the defendant is arraigned, and upon his motion, in either of the following cases:

1. *When it is not found*, indorsed, and presented as prescribed in the chapter relating to that subject. That chapter treats of the number, qualifications, drawing, summoning, challenging, and oaths, of grand jurors—of their powers and duties, of the number requisite to concur in the finding of an indictment, and generally of all matters appertaining to the finding of the bill. So that when a true bill is found, and presented to the court, and filed as a public record, if the accused party thinks it was not found in all particulars as set forth in that chapter, it becomes his duty, in order to avail himself of any alleged defect, to move the court, on or before his arraignment, to set aside the indictment. The statute directs that, on his motion, for any of the reasons therein stated, the court must set it aside. The above is, then, the order of pleading established by this statute, giving notice to all parties of the course to pursue, and of the proper time to intervene. And in this order alone may the defendant successively plead all these kinds of pleas and denials. He cannot, at common law, vary the settled order, for by a plea of any of these kinds, he is taken to waive or renounce all pleas or objections of a kind prior in the series. This short and simple form of a motion to set aside the indictment, embraces, as grounds for the motion, any matters of fact tending to impeach the correctness or regularity of the finding. In the case now before us, the defendant had the fullest opportunity, after the filing of the indictment, to present or to renew objections, so as to place them properly and adequately upon the record. If he felt that any of his rights had been prejudiced because the indictment was found by a grand jury not properly constituted or not having the proper authority, he ought to have gone into court, before pleading to the merits, with affidavits or other proof, and made the requisite motion. By this reasonable course he would have placed the whole matter upon the record, and would have also given the court a full oppor-

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tunity to judge of the fairness of his application. And if the law and the merits were with him, the time, labor, and expense of a trial upon an imperfectly found indictment would have been saved. But this defendant and his array of counsel freely chose not to pursue the plain course pointed out by the law. He never made, or offered to make, any such motion. And it is rightfully to be presumed that the course he did take, was taken upon due deliberation and of his own free will and accord. Now, throwing aside any common law considerations, what does this very Statute of 1862-3, held by the majority of this court to have been the law, and the only law, applicable to the subject, explicitly declare? Mark its solemn, uncompromising mandate, as obligatory upon courts as upon parties. It declares that "if the motion to set aside the indictment be not made, the defendant is precluded from afterwards taking the objections."

The majority of this court knew, or were bound to know, that this defendant was thus precluded; and that, therefore, they had no authority to hear, and no right to pronounce upon this objection. The legitimate and inevitable consequence of all which, is just this: that their own favored and approved statute being the only standard and criterion, the matter alleged as error was *coram non judice*, and they had no jurisdiction.

And as tending to show that I am not alone in thus construing that statute, I shall quote at some length from the opinion of Lewis, C. J., in 7 Nevada R., 333, *State v. Roderigas*: "It is argued that the indictment is defective, in that it does not show that it was found by a grand jury having the proper authority." To this point it is sufficient to answer that it was not taken by demurrer or by motion at the proper time, and, therefore, under our statute cannot afterwards be raised. Section 275 of the Criminal Code of Procedure, among other things, declares that, "The indictment shall be set aside by the court in which the defendant is arraigned and upon his motion, in either of the following cases: First, where it is not found, indorsed, and presented as prescribed by this act;" and section 277 provides, that "If the motion to

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set aside the indictment be not made, the defendant shall be precluded from afterwards taking the objections mentioned." No motion for this purpose was made in this case. \* \* \* \* Thus, it will be observed the objection to the indictment that it does not show that it was found by a grand jury having authority to find it, and all objections of a similar character, can only be raised by motion or a demurrer specifically designating the objection."

There is likewise another portion of the Statute of 1862-3, to which, it would appear, due attention was not given. It is as follows: "No indictment is insufficient, nor can the trial, *judgment*, or other proceedings thereon, be affected by reason of a defect or imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant, upon the merits."

Although this Statute of 1862-3 has been already made to perform a very conspicuous part in this case, yet it cannot be dropped without viewing it in the new and strange light reflected upon it by the decision of this court. As to the point now involved, it has been seen it is of no consequence whether that statute was then in force, or was not in force. I am of the opinion, however, that it was not. To comprehend this subject fully, it is important to review the history of the legislation bearing upon it. The first act of the Legislative Assembly relating to criminal procedure was that of April 28, 1862. The second was that of the session of 1862-3, approved January 9, 1863, which repealed all acts or parts of acts inconsistent with it. The third was chapter eighteen of the laws of 1867-8, entitled "An act relating to the challenging of jurors in civil and criminal cases," which repealed all acts and parts of acts in conflict with it. The fourth was chapter nineteen of the laws of 1867-8, entitled "An act respecting grand and petit jurors of the district courts," which repealed chapter fifty-two of the session laws of 1862, and chapter twenty-six of the session laws of 1862-3, and all other acts and parts of acts in conflict with it. The fourth was that of the session of 1868-9, approved January 12, 1869, which

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entirely abrogated and abolished all modes of procedure before enacted—pending proceedings alone excepted.

This was the condition of the legislation on the subject from the last named date until January, 1873. Within a period of about ten years, the people of the Territory had witnessed the existence of all these laws, and then the repeals as above specified. Their Legislative Assembly had deliberately discarded the Code of 1862-3, after six years' trial of it. The Code of 1868-9 had been undergoing a probation of about four years. It is evident there was dissatisfaction. None of these codes, it seems, answered the wants and interests of the public. The people had been learning in the school of experience. From the first organization of the Territory, they had seen that, in criminal cases on the Federal side of their courts, the proceedings, practice and pleadings were in accordance with the common law, as regulated and modified by Acts of Congress and decisions of the Federal courts. This mode of procedure was working smoothly and effectively; and was, it is likely, affording a higher degree of satisfaction, than was to be derived from the operations of crude, perplexing, and awkwardly jumbled codes, borrowed from the statutes of various States. Instead of two differing systems in the same court—one for Federal cases, and the other for Territorial cases—it was, no doubt, deemed expedient to have but one. That this was the feeling and desire of the people, is deducible from the fact that, on the 8th of January, 1873, their representatives in the Legislative Assembly enacted the following law:

An act to repeal chapter first of the laws of 1868-9, entitled "An act to establish a Code of Criminal Procedure for Dakota Territory." Approved January 12th, 1869, and for other purposes.

*Be it enacted by the Legislative Assembly of the Territory of Dakota:*

SECTION 1. That chapter first of the laws of 1868-9, entitled "An act to establish a code of criminal procedure for Dakota Territory," approved January 12th, 1869, be, and the same is, hereby repealed.

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SEC. 2. That from and after the passage and approval of this act, the proceedings, practice and pleadings in the district courts of this Territory, in criminal cases, shall be in accordance with the proceedings, practice and pleadings of the common law, except where the same is otherwise expressly regulated by law, and such proceedings, practice and pleadings shall be assimilated as near as may be with the proceedings, practice and pleadings of the United States or Federal side of said courts. *Provided*, That chapter eighteen, of the laws of 1867-8, entitled "An act relating to the challenging of jurors in civil and criminal cases," and chapter nineteen of the laws of 1867-8, entitled "An act respecting grand and petit jurors of the district courts," shall remain in full force and effect.

SEC. 3. Writs of error, bills of exceptions and appeals, shall be allowed to the defendant in all criminal cases, when required by him, under such rules and regulations as the supreme court of the Territory may prescribe; and the said supreme court shall, at its first annual session, make all necessary rules and regulations to carry this section into effect.

SEC. 4. This act shall take effect and be in force from and after its passage and approval.

Approved, January 8th, 1873.

Here is a statute that has nothing obscure, ambiguous, or doubtful about it. The words embody a definite meaning, involving no incongruity or absurdity. There is no contradiction between its different parts. The thought which it expresses is lucid and manifest. The meaning is apparent on its face, and that meaning is the only one which we are at liberty to say was intended to be conveyed. In this case there is no room for construction. The meaning which the words declare, is the meaning of this statute; and neither the courts nor the legislature have a right to add to, or take from that meaning. (7 N. Y., 99; 11 N. Y., 593.) It is not permitted to interpret what has no need of interpretation. When an act is expressed in clear and precise terms; when the same is manifest and leads to nothing absurd, there can be no reason not to adopt the sense which it naturally presents. To go

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elsewhere in search of conjectures in order to restrain or extinguish it, is to elude it. (13 N. Y., 78; 9 Barb., 161; Vattel, B. 2 Ch., 17, § 263; 2 Crauch, 358.) Courts are bound to seek for the intention of the legislature *in the words of the act itself*, and they are not at liberty to suppose or to hold, that the legislature intended anything different from what their language imports. (7 Hill, 513.) And the intention thus derived, it has always been held, is the best guide in the construction of statutes. (3 Wheat., 631; 8 N. Y., 535.) In the second section is given a familiar, simple, and perfect substitute for all past codes of criminal procedure. The common law mode, assimilated to that on the Federal side of these courts—that is to say, the common law as expressly regulated, moulded, or modified, by Acts of Congress and the decisions of courts, and by any existing local laws, is prescribed as the sole rule of proceedings, practice, and pleadings, in all cases arising thereafter.

The legislature, moreover, looking back over the vista of the entire life of the Territory, and over all the prostrate and defunct codes, deliberately selected, from the ruins and the rubbish, only two enactments of them all, naming them, to-wit: chapters eighteen and nineteen of the laws of 1867-8, and expressly declaring that these two portions of the entire debris should be revived, and remain in full force and effect; and thereby, by an established rule, excluding and reprobating all others not named. And in the third section, in lieu of the abrogated provisions as to writs of error and appeals, they substituted such rules and regulations as the Supreme Court might prescribe. The legislature had sense enough to perceive that after all that could be said in their favor, these codes were but attempts to enunciate and to arrange the rules and maxims of the common law, with which every lawyer and judge was supposed to be acquainted. They preferred to leave the whole matter to the courts, rather than any more to trust in the efforts of codifiers who had given them, instead of what was applicable to their territorial condition, ill-digested and incongruous laws, hastily patched up from the statutes of different States.

One is at a loss to know what can be plainer than this statute. The intention, the reason, the thought of the law—the mischief and the remedy—all are equally perspicuous. Very many people will inquire what there is in it, which can possibly betray the slightest intention to revive the Statute of 1862-3. They will naturally ask, by what legerdemain of logic or law—by what subtle, occult process—could such a result be achieved? But the curious on the subject must resort to the opinion filed on behalf of the majority of this court. There they will see that an antique rule, (unsuited to the genius of our institutions, and declared by the sovereign law making power of the Territory to be Anti-American,) which, at all events, whether in force here, or not in force, has no possible application to this statute, has been invoked and forced into unwonted and grotesque service. They will find that a depletive process is adopted by which the interpreter of the law strangely stops short at the end of the first section, in order to call in this ancient rule, and refers to Dwarris, without quoting from that author. But even Dwarris says that “By the repeal of a repealing statute, (the new law containing nothing in it that manifests the intention of the legislature that the former act shall continue repealed,) the original statute is revived.”

They will, furthermore, perceive that an Act of Congress which declares that, “Whenever an act shall be repealed which repealed a former act, such former act shall not thereby be revived, unless it shall be expressly so provided,” is not, in a Territorial court, entitled to receive even as much consideration as a mere opinion of some State court.

They will see, finally, that in violation of a mandate which declares that the common law shall be the rule, except where the common law is otherwise *expressly* regulated by law, a dead statute is resurrected by the sheer force of *implication*.

But to conclude: Other arguments and authorities bearing upon the case, might be given. I have, however, neither time nor inclination to pursue the subject any further. I have expressed my opinion and the reasons therefor at far greater

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length than I could have wished, but the importance of the case must furnish my excuse.

In my opinion the judgment should be affirmed.

SEPARATE OPINION OF ASSOCIATE JUSTICE BARNES: I did not intend to, and probably should not have felt called upon to file a separate opinion in this case, were it not for the fact, that in the dissenting opinion filed, the Chief Justice seemed to assume, or at least to convey the idea, that the majority of the court, by their decision, affirmed and approved all the rulings of the court below, as well as the instructions to the jury, and the refusal to give other instructions asked for. Such, however, is not the case. The Supreme Court pursued the usual course, viz.: Where the appellate court determine that there is error in the proceedings of the court below, anterior to the trial of the case, and which sends the case back to be again acted upon by a grand jury, the appellate court seldom allude to alleged errors upon the trial, or to instructions to the petit jury. I think the Chief Justice well understood that his associates did not, and could not indorse or approve his argument or instructions to the jury, or his manner of disposing of a number of the instructions asked for, by the defendant's counsel. The majority of the court purposely left the charge of the court below, and the manner of giving and refusing instructions, judicially untouched. The discussion of those matters in the dissenting opinion was unnecessary for the disposal of the case. This case was brought into this court for review; the counsel for the prosecution and defense submitted their points, briefs and arguments, and by agreement made in open court, read such portions of the record of the trial and proceedings in the court below, as the counsel agreed was necessary to a full understanding of the case under review in the Supreme Court.

The court sanctioned this usual and reasonable practice, and acted upon the records, points, briefs, and arguments then submitted. After this case has been decided, and upon the case thus presented in the Supreme Court, the Chief Justice, from a different standpoint, presents an argument more



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elaborate than any before submitted to the court. This argument being new as well as novel, seems to demand some slight notice from me. The Chief Justice affirms that if the section of the Statute of 1862-3, which gives the defendant the right to challenge a grand juror after the grand jury has been sworn and charged, is merely declaratory of the common law, conferring no right, then there is an end to all doubt and question. Precisely so, and upon this point there seems to be no difference of opinion; for if this statute secured to the defendant no right—or in other words, if this statute of 1862-3 is entirely meaningless, and leaves the right of challenge just where it existed at common law, then of course there is no error in disregarding its provisions. This is the view taken by the majority opinion. The Chief Justice then proceeds to reproduce in his opinion, the record of what transpired in this case prior to April 17th, 1874. I am entirely unable to discover, that the record here reproduced has the remotest bearing on the question under consideration. If the Statute of 1862-3 secured to the defendant no right, but left the rule as at common law, that ends the whole controversy and the reproduction of the record is unnecessary. If the Statute of 1862-3 in fact does secure to the defendant rights, which he was not entitled to as a matter of right at common law, and the exercise of such rights was denied defendant in the court below, then the reproducing of this record is of no moment, for when produced, it simply substantiates just what is claimed by the defendant, viz.: that the right to challenge the grand juror Delamater, after being sworn and charged, was denied defendant. The reproducing this record tends only to obscure and conceal the real question. No good lawyer will claim, and certainly the Chief Justice does not mean to be understood as claiming, that the fact that the record shows that prior to the swearing of the grand jury and prior to the time that the jury was charged and instructed by the court, a prisoner could in advance waive a right that was then not his.

Let us state this more clearly and strongly. Assuming that this Statute of 1862-3 means what it says, viz.: that after

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the grand jury has been sworn and charged, a person held to answer for a public offense, may challenge, etc., then I assert, the person so held could not even by stipulation made prior to the swearing of the grand jury, have deprived himself of the right to challenge after the swearing of the jury. The prisoner would no more be bound by an agreement of this kind if made, than would a prisoner be bound by an agreement made in advance, that if a grand jury found an indictment against him, he would plead guilty to the charge. But the Chief Justice says—the defendant expressed himself satisfied with the jury and wanted them sworn. This is true, undoubtedly, for until they were sworn, he had no way as a matter of legal right, of ascertaining whether they were proper persons to act in his case. Any objections prior to that time would have been addressed to the discretion of the court.

While the Chief Justice affirms with so much earnestness, that no accused party ever had a fuller or fairer opportunity for asserting his legal rights, upon the organization of a grand jury, than was accorded the defendant, I assert that it plainly and palpably appears from the record of the court below, that the defendant was denied a plain, substantial legal right.

This court will not stop to inquire to what extent this error may have prejudiced the defendant, but will only inquire, could it have prejudiced the defendant? For this court at this present time, in the case of *Yankton County v. Rossteuscher*, has declared the rule to be this—that where improper evidence was received under objection, the appellate court will not stop to ascertain whether the improper evidence was in fact, prejudicial to the party objecting, but will only examine sufficiently to ascertain whether it could have injured the objecting party; and this rule was most strenuously insisted upon by the Chief Justice. I think this rule is binding upon this court, and is properly applicable to the question now under consideration.

But again: The Chief Justice argues at great length and cites innumerable authorities to establish another conceded proposition—namely, that at common law it is too late to

challenge a juror, after being sworn, except by permission of the court. In other words, at common law, a person held to answer a public offense, cannot as a matter of legal right, interpose a challenge to a grand juror, after the jury is sworn. This is the expressed opinion of a majority of this court. It is a proposition no lawyer will attempt to controvert, and yet the Chief Justice cites some forty authorities and makes a long argument to prove this conceded proposition. But just here is the difference between the common law and the statute of the Territory. The session laws of 1862-3, Criminal Code, § 13, provides—that a person held to answer a charge for a public offense may challenge the panel of a grand jury, or any individual grand juror, before they retire, after being sworn and charged by the court. This secures to the defendant by positive law, that which before rested on the discretion of the court. Now how does the Chief Justice seek to avoid the plain provisions of this statute? Simply by asserting that the legislature did not intend to enact, what they did in fact enact; but that on the contrary, the legislature intended to say, that a person held to answer a charge for a public offense, shall not be permitted to challenge the panel of the grand jury or any individual grand juror after they are sworn and charged by the court. This proposition may be admired for its boldness if for no other reason; but the curious will naturally inquire, if this statute secures to the accused no right he did not possess before, why legislate at all upon the subject? All such inquisitive persons are most respectfully referred to the elegant argument, filed in this case, by the Chief Justice. They will there find that while the legislature intended to enact and supposed they had enacted a law, plain and reasonable in its provisions, that in point of fact, they enacted no law at all. But really what reason does the Chief Justice assign for mangling and crucifying this law, which in furtherance of justice, aims at securing true and impartial men, and those only too, as grand jurors.

He says that when the court delivered his charge to the grand jury, it was a public judicial recognition of its official existence as an appendage of the court—when once created a

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lawful body it was to remain such until dissolved and broken in some manner pointed out and allowed by law. This is true, and the error is to be found in the fact that when the defendant, in the way pointed out by law, sought to break this jury and challenged the juror Delamater, the court uncere- moniously turned him away and said to him, "that law under which you seek to break the jury is repealed." (Mark the language.) Then it was not claimed that the law prior to its repeal was of no force or effect, but the right to challenge was denied, and so stated by the court below on the ground that the law of 1862-3 was repealed, and the defendant's counsel was admonished that if they were allowed to chal- lenge a grand juror, it was a matter of grace and favor and not because of a legal right so to do. And the Chief Justice in his argument on file in this case asserts that the court below pointed out and intimated, and indeed almost besought the defendant's counsel to excuse their default, and come in in some other way, and they would not.

The Chief Justice in his argument urges as another reason why the challenge should not be allowed as claimed by the defendant, that its effect would be to disintegrate the grand jury, and yet he asserts that the court below in the exercise of its discretionary power, could allow the challenge after the grand jury were sworn and charged. This naturally suggests the inquiry—would not the disintegration of the grand jury have been the same had the challenge been allowed under the discretionary power vested in the court below, that it would have been if allowed under the provisions of the Statute of 1862-3? But the Chief Justice has still another reason. He says: In view of the solemn oath the juror Delamater had taken, this was a grave charge against his honor and reputa- tion and tending to his infamy. Truly this is a most remark- able statement. If under such circumstances the challenge allowed by law, is a reflection upon a juror, would it be any the less so were it addressed to the court, and the challenge urged as a matter of favor excusing the default in not having made it sooner? But it is no reflection; it might as well be asserted, should a defendant avail himself of the provision of

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the statute allowing him to present his affidavit that the Judge of the court in which he was to be tried for a crime was prejudiced against him and upon that affidavit to ask for a change of venue to some other court, was a reflection upon the honor and integrity of the Judge, and yet this is the almost universal practice in criminal courts. But assume that it is a reflection, is the defendant to be deprived of a legal right, or is a plain statute to be disregarded because the exercise of the right or the enforcement of its provisions may chance to hit somebody? Laws tending to secure a fair and impartial investigation, are to be liberally construed.

I fail to discover that the Chief Justice has given one good reason for asserting that this statute of 1862-3 is only declaratory of the common law. Surely he will not claim that inasmuch as the courts in their discretionary power at common law could exercise this authority, that, therefore, the legislature did not intend to declare as a matter of absolute right, that a defendant under certain circumstances might challenge a jury or a juror, and without permission of the court. I think I am safe in saying that the history of all legislation in this country, as well as in England, for a long period of time, has tended strongly in the direction of securing to parties charged with crime, such rights as they were entitled to, and divesting courts of discretionary power in all cases where it is safe and prudent to do so. Why should the right to challenge a juror be in abeyance, subject to the will or caprice of court or judge? The time was in England and of comparative recent date, when the allowance or refusal of a writ of error was a discretionary power. So in the matter of bail, courts and officers had almost unlimited power to grant or refuse bail. Now in most cases it is secured to the accused by legislative enactment as a legal right, and I might cite innumerable instances of it were it necessary.

Again the Chief Justice says: "I dissent from the decision of the majority of this court for another reason, and shall proceed to state it. Going upon the assumption that the said statute was and is in force, I hold that the defendant by voluntarily pleading not guilty to the indictment, and by de-

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manding to be tried by the country on the merits, became precluded from afterwards taking this objection. It seems to have been forgotten by the majority of the court that this statute appoints and fixes a precise order and rule of pleading. It prescribes that when a defendant is arraigned, he may in answer to the arraignment, (1) move the court to set aside the indictment, (2) may demur, or (3) plead thereto. And first as to the motion to set aside the indictment; it declares that the indictment must be set aside by the court, in which the defendant is arraigned, and upon motion in either of the following cases: when it was not found, indorsed, and presented as prescribed in the chapter relating to that subject."

Now, first, I assert that the statute referred to by the Chief Justice, is not correctly given by him. The provisions of the statute on that subject: Section 1, chap. 21, Criminal Code of 1862-3, contains this provision—"the indictment must be set aside by the court in which the defendant is arraigned, and upon his motion in either of the following cases: First, when it is not found, indorsed, and presented as prescribed in chapter 32." Now the Chief Justice has depleted this statute by leaving out the words "in chapter 32," and adding the words "in the chapter relating to that subject." This perversion of the statute is significant and important, in the investigation of this matter, as chapter 32 referred to, contains no provisions upon the subject, and the Chief Justice has no warrant or authority for mutilating this statute, or for claiming that when the legislature referred to chapter 32, they mean or intend to refer to some other statute. But yielding this point for a moment and assuming that they intended to refer to chapter 18, laws of 1862-3, as this is the chapter relating to grand juries;—now while I do not concede that in a criminal case the court has the right or authority to say, that when the legislature refer to chapter 32 that they mean some other chapter; yet, as chapter 32 does not refer to grand juries and chapter 18 does, I shall assume that chapter 18 was intended by the legislature when they say "32." And how does this question then stand? Now § 1, chap. 21, Criminal Code of

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1862-3 provides, "that the indictment must be set aside by the court in which the defendant is arraigned, and upon his motion in either of the following cases: when it is not found, indorsed, and presented as prescribed in chapter 32," meaning chapter 18; "when the names of the witnesses examined before the grand jury, are not inserted at the foot of the indictment, or indorsed thereon, or when a person is permitted to be present, during the session of the grand jury, while the charge embraced in the indictment, was under consideration, except as provided in section 42." Then section 2 provides, "if the motion to set aside an indictment be not made, the defendant is precluded from afterwards taking the objection mentioned in the last section."

Now, first, let us see how the Chief Justice has depleted this section, for it is the only section in which the language quoted by him is to be found. He has despoiled this section 2 by leaving out the qualifying words, viz.: "mentioned in the last section." With that section thus depleted, and then by omitting to refer to the five specific objections, which are considered waived unless taken by motion, the inference would seem to be irresistible from the arguments of the Chief Justice, that all objections to the indictment, or to the drawing, impanelling, swearing and challenging of the grand jury, were waived unless the objection was taken by motion. Such, however, is not the case. There are five objections that must be taken by motion, if taken at all. Now § 60, chap. 18, Criminal Code of 1862-3, provides that an indictment cannot be found without the concurrence of at least twelve grand jurors. Same section provides, the indictment must be indorsed a true bill. Section 64 provides, that it must be presented by the foreman of the grand jury to the court, in the presence of the grand jury; and section 63 provides, that the names of witnesses must be indorsed on the indictment. Section 42 provides, that at certain times the District Attorney, and no other person, may be present with the grand jury. Therefore, when the law is fairly stated, the five enumerated objections, all formal and none effecting the question involved in this case, are the only objections that must be taken by motion. But such warping and depleting the

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various provisions of the statute never before came under my observation; and here I may as well state, that the Chief Justice is equally at fault in defining the rule at common law. It is true at common law, that if a defendant pleads not guilty that he waives the right to go back and interpose a demurrer or dilatory plea, but it is not true that he is thereby precluded from moving in arrest of judgment after conviction and insisting on the same objections, as error, that he might have presented by demurrer; and good practitioners will seldom demur to an indictment, preferring, in case of conviction, to rely upon a motion in arrest of judgment. I understand this to be a general rule, that if the error complained of, in any way appears as a matter of record, that the motion in arrest of judgment, brings the matter properly before the appellate court. On this point I refer to § 888, Bishop on Criminal Procedure, Vol. 1, second edition; also § 889, same authority.

Now for a moment let us look at the main reason assigned by the Chief Justice for this rule or its enforcement. It is this: that by this motion this matter would be placed on the record. Let us consider that objection. On the 17th of April, 1874, the defendant's counsel challenged the juror Delamater, claiming the right to that challenge under the law of 1862-3. This is no less than a motion to set aside the juror for cause. The court overruled that application, challenge or motion, and declared that the law under which they claimed that right was repealed. To that ruling the defendant's counsel excepted. That exception was signed by the Chief Justice—sealed with the great seal of the court, and marked "Exception No. 4." If by this operation it was not made, and did not become a matter of record, by what process could it be made so? If it was not the view of the court at that time, that this motion and exception, thus became a matter of record, then all this ceremony was a meaningless farce. The reason urged, then, by the Chief Justice, why this motion to set aside the indictment should have been made, is answered.

I have, thus far and at some length, pointed out the errors and inconsistencies of the dissenting opinion in this case, and



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particularly on this question of waiver, by reason of the defendant's not making a motion to set aside the indictment; nevertheless I am not quite ready to bid farewell to this question without referring to two or three sections of this same law of 1862-3, which certainly removes all doubt, if any before existed as to the propriety of reviewing this question of the challenge of the juror Delamater, in the Supreme Court. And first I refer to § 46, chap. 32, laws of 1862-3, and there this language will be found: "No assignment of errors, or joinder in error, shall be necessary upon any writ of error issued in a criminal case, but the court shall proceed on the return thereto and render judgment upon the record before them." Now there can be no question that the hearing in the appellate court is upon the record. Then section 43 provides—"when judgment upon a conviction is rendered, the Clerk must enter the same upon the minutes, stating briefly the offense for which the conviction has been had, and must immediately annex together and file the following papers which constitute the judgment roll: first, a copy of the minutes of challenges interposed by the defendant to the panel of the grand jury, or to individual grand jurors and the proceedings and decision thereon." Now is there any question, but what the defendant has pursued the exact course pointed out by law, to have this question reviewed? He has interposed his challenge; he has been overruled by the court below; he has excepted to the ruling and decision of the court. That challenge and proceedings thereon has been made a matter of record; it is a part of the judgment roll; it has by writ of error been brought into this court for review, and here disposed of as a majority of this court determine, in a legal and proper manner.

Still I find another question is suggested by the argument of the Chief Justice. He says: "Here it may be well to observe, that in the opinion of the majority of this court it is considered that Mr. Delamater, was a disqualified grand juror, whose presence vitiated the whole panel. But how was he disqualified? Upon what part of the record does this appear?" It is very apparent that the learned Chief Justice

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misapprehends the question. It is this: The defendant challenged the grand juror Delamater, on the ground of bias and prejudice against the defendant, and for this reason that he was disqualified from sitting as a juror to investigate the charge against the defendant. The prosecution thereupon refused to take issue on the allegations of the challenge, and try that issue, but in legal effect admit the challenge to be well taken, except, they aver, that the challenge comes too late, and the defendant cannot avail himself of the disqualification and set aside the juror. The court below sustain this view of the matter and declared plainly that by reason of the laches or negligence of the defendant, this conceded disqualification of the juror could not be made available to the defendant. It is like the offer in a civil action, by the plaintiff to prove the defendant's signature to a promissory note, declared on. The defendant objecting to the evidence to prove the signature on the ground that the offer came too late. The court sustains the objection and says, this offer comes too late and there is no excuse for the delay. The objection is sustained; the plaintiff excepts; it comes into the appellate court for review. The question is, was the offer to prove the signature too late? In the case thus stated, the defendant would not be permitted to assert, that it no where appears that the witness knew the defendant's signature or would have testified that he did. But for the purpose of determining whether the offer to prove the signature was too late, and whether there was error in rejecting the evidence, it is considered that the offer to prove the signature would have been made good, and that the witness would have testified to its genuineness, and upon this theory the appellate court would determine the question of error. Or take the case where a party makes a tender. Now as a matter of law nothing but gold and silver is a legal tender, and yet a party tenders bank bills. The person to whom the tender is made refuses the tender for the reason as he then states, that the amount is not sufficient. Now when the question comes to be investigated, was this a legal tender, the only question to be determined is this: was the amount sufficient. The party to whom the tender is made will not be permitted to urge that the tender

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is not valid for the reason that it was only an offer of bank bills. The party, by placing his refusal to receive the tender, on the ground that the amount was insufficient, concedes and admits that in other respects, the tender is good. Or state the proposition in another way. When the defendant challenged the juror Delamater, the prosecution set up in avoidance of that challenge the negligence and laches of the defendant in not interposing the challenge at an earlier period. Now, technically, the matter in avoidance should not have been considered by the court below, unless the prosecution had first, upon the minutes of the court, confessed the causes set forth in the challenge to be true. But the court below did in fact hear the matter, set up in plea of avoidance—namely, the laches and negligence of the defendant without first requiring the prosecution formally to admit the challenge to be true. The matter set up by the prosecution in avoidance of the challenge was held good, and the prosecution thus had the benefit of their plea in avoidance, without the formal confession, which properly should have preceded it upon the record. Having had the full benefit of that plea or matter in evidence, the prosecution cannot avoid the responsibility, that they had confessed the challenge, when they set up or plead matter in avoidance of it. Any other view would deprive the aggrieved party of the right of review, which is provided for by this same Criminal Code. See §§ 43 to 46, inclusive, chap. 32, laws of 1862-3. For if the court below refused to take the testimony as to the truth of the challenge and then on appeal this court says, there is neither evidence of the truth of the challenge nor a legal admission of its truth, then by this course the injured party is deprived of a review. *Such a course cannot be sanctioned.* The prosecution must be held to have admitted the truth of the challenge the moment they set up matter in avoidance of it, the same in every respect as though the admission of its truth was fully spread upon the record.

This brings us to the consideration of the last and only point necessary to be considered, which is the only real and important question in the case, viz.: Was the Criminal Code

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of 1862-3 in force in April, 1874? The Chief Justice says, in substance, that in 1872-3, the legislature, looking back over the vista of the entire life of the Territory, and over all the prostrate and defunct codes, deliberately selected two enactments, naming them, and declaring these two statutes, to-wit: chapters 18 and 19 of the laws of 1868-9, in force, and by an established rule excluding and reprobating all others not named. The plain reading of the law, as well as cotemporaneous history, to my mind, clearly disproves this assertion. It must be borne in mind that the Criminal Code of 1868-9, had been in force four years. The Criminal Code of 1862-3, had been in force six years. The legislature of 1872-3 deliberately repealed the Code of 1868-9, well knowing that the repeal of the Code of 1868-9 as effectually re-enacted or brought into life or force the Criminal Code of 1862-3, as it would have done had the legislature, section by section, re-enacted it. And whether this doctrine be Anti-American or not it is a rule of the common law, and for this reason if for no other, the Chief Justice will recognize the rule until the law-making power shall see fit to change it. Courts should administer the law as they find it, and not attempt to legislate. Now it will be observed that § 1 of chap. 5, laws of 1872-3 is the section repealing the Criminal Code of 1868-9 and reviving the Criminal Code of 1862-3. Thus far it will be observed, and if we were to stop here all will agree, that the Criminal Code of 1862-3 is in full force. Then section 2 of the same chapter contains this provision—"that from and after the passage and approval of this act, the proceedings, practice and pleadings in the District Court of this Territory in criminal cases shall be in accordance with proceedings, practice, and pleadings of the common law, except where the same is otherwise expressly regulated by law." The words, "except where the same is otherwise expressly regulated by law;" the majority of this court hold, that the language above quoted is the language ordinarily used where it is necessary to add to statutory enactments relating to practice or pleadings, a saving clause, to the end that where legislative enactments are not full or complete, that the common law shall

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come in in aid of the statutory provision. So far as I have been able to discover, a provision similar to the one under consideration and for the accomplishment of the same purpose, has in every instance where there has been a radical change from the common law to the code practice, been inserted. To illustrate: take section 526 of the Criminal Code of this Territory, passed at the session of 1874-5, you have this language—"that from and after the taking effect of this act the procedure, practice and pleadings in the district courts of this Territory, in criminal actions, or in matters of a criminal nature, not specifically provided for in this code, shall be in accordance with the procedure, practice and pleadings of the common law, and assimilated as near as may be with the procedure, practice and pleadings of the United States or Federal side of said courts." Now let us compare the controlling language of section 2 of the act of 1872-3 with the controlling language of section 226 of the Criminal Code of 1874-5, and ascertain if there is any substantial difference. It is provided in the Criminal Code of 1874-5 that in all cases not specifically provided for in this code (1874-5) it shall be in accordance with the procedure, practice and pleadings of the common law, and in section 2 of the act of 1872-3 we find this language—"the proceedings, practice and pleadings in criminal cases shall be in accordance with the proceedings, practice and pleadings of the common law, except where the same is expressly regulated by law." I assert there is no substantial difference—that the intent is this, and this only: that we are to ascertain to what extent there is a Criminal Code or statutory provision to meet all classes of criminal proceedings, and that when statutory provisions are not full and complete the common law comes in and supplies omissions. This construction is consistent, any other is nonsensical and visionary. The Chief Justice asserts in substance that the legislature of 1872-3 had become disgusted with all criminal codes, discarded every thing of the kind and embraced the common law. I can in no sense thus interpret the intention of the legislature, and I think the Chief Justice will be forced to confess if the legislature of 1872-3 were disgusted with criminal codes, enamored with the smooth work-

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ing of the common law practice, their love was brief and very unstable—for at the very next session of the legislature, and at a time when the two systems of practice were being thoroughly discussed, they unanimously adopted a voluminous Criminal Code. Hence as a matter of history it appears there has never been the hour from the time of the meeting of the legislature of this Territory in 1862-3 to the present moment, that the common law practice has prevailed in the territorial courts in this Territory, and with the exception of the attempt in the Second District, for about one year, to enforce that practice, I know of no effort in that direction. The Code practice, civil and criminal, is essentially American, and whether in the first instance, it was a wise departure from the common law, is not now a question to be considered; the departure has been taken and there will be no backward movement. American ideas never retrograde. I have in the main avoided the discussion of such questions as were discussed in the opinion filed by Justice Kidder.

Having referred to some of the principal points made by the Chief Justice, I have neither time nor the inclination to follow the discussion into the realms of imagination. Whether the defendant is guilty or not guilty of a high crime, is not involved in the question determined by this court—namely, that the defendant was not put upon his trial on an indictment found, indorsed, and presented by a properly constituted and legally organized grand jury. Every man charged with crime is guaranteed a fair and impartial trial according to law. And it is of the utmost importance that the law be determined correctly, administered fairly and impartially, without fear or favor. Whether the opinion of the court of *dernier* resort in this young Territory, meets with the present approval or condemnation of the popular voice, is of infinitely less importance than the calm assurance that all questions submitted to this court will be determined according to law. The organization of the Supreme Court in a territory is liable to some criticism, from the fact that the Judge who sat in the court below and whose decisions are being reviewed, has an equal voice in the final determination of the question in the

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appellate court. However honest or able the Judge may be who is called upon to review his own deliberate decisions in the court below, he will often find himself hampered by former opinions formed during the progress of a long and exciting trial, and unable to consider the principles of law with a calm and unbiased judgment; and yet justice and the paramount interests of all, demand that every facility should be afforded a party desiring a review of the questions of law involved in his case, to present the alleged errors in the appellate court, and have them passed upon by Judges, untrammelled and unbiased by influences, too apt to prevail in the court below. By an abiding conviction that the questions of law will be thus reviewed and determined, the Judges of this court will deserve and receive the confidence of all persons who honor and respect the impartial administration of law.

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NOTE.—Defendant Wintermute being indicted the second time for murder, pleaded a former acquittal, and the venue was changed from Yankton to Clay County. On the sufficiency of that plea the presiding Judge (BENNETT) delivered the following opinion:

## REPORTER.

It appears from the record that on the 18th day of May, 1874, defendant was placed on trial in the District Court of Yankton county, on an indictment, consisting of but one count, charging him with the crime and felony of murder, to which he pleaded "not guilty," and that on the 3d day of June, 1874, the jury returned the following verdict into court:

"We, the jurors, do not find the defendant, Peter P. Wintermute, guilty of murder, but do find him guilty of manslaughter in the first degree."

Defendant filed a motion for a new trial, and also a motion in arrest of judgment, both of which motions were overruled by the court, and the defendant sentenced to imprisonment in the Penitentiary for the term or period of ten years.

The defendant applied for and obtained a writ of error, and the cause was removed to the Supreme Court. That court, without passing on the motion for a new trial, sustained the motion in arrest of judgment, and ordered "that said judgment of conviction of Peter P. Wintermute of manslaughter, as aforesaid, be arrested and reversed." And that court further ordered, "that said defendant be discharged from his said arrest upon said judgment and conviction, and it is further ordered that said defendant be and he is hereby ordered into the custody of the sheriff of the county of Yankton, to be held by him to answer to any new indictment which may be found against him, said Peter P. Wintermute, in the premises, by the grand jury of said county."

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That on the 6th day of May, 1875, the defendant was again indicted for the crime of murder by the grand jury of Yankton county. To this indictment he interposes the plea of *autrefois acquit*. The prosecution replies, setting out the record, and to this replication the defendant demurs. On entering his plea, defendant applied for and obtained a change of venue, and the cause was sent to this county.

Generally, the plea of *autrefois acquit* is required to be accompanied by the record, and in that case the demurrer would be filed by the people.

In this case the record is exhibited by the prosecution, as a part of the replication, and defendant demurs. In either case the ultimate question for determination is, as to the sufficiency of defendant's plea.

Without stopping to notice the technical points raised on questions of practice, I shall proceed to examine briefly the main issue presented.

The question seems to be, comparatively, a new one, and arises for the first time in this Territory; and the learned counsel, in their able and exhaustive arguments, have been able to furnish but few, if any, adjudicated cases exactly in point, and we are relegated to principles and analogy for its solution.

Turning to the text books we find that the principle contended for by defendant's counsel, is not so much as mentioned by such writers as Chitty, Wharton, Bishop and Archibold, in their treatment of the subject of motions in arrest of judgment, and their effect when sustained, and their very silence indicate, at least, that it is of recent birth. Not so when the judgment has been reversed, and a new trial ordered. In that case the question whether the defendant can again be put upon trial for a higher degree of crime than the one for which he was convicted on the former trial, has been repeatedly adjudicated, and is ably discussed by some of our writers on criminal law: but is regarded by Mr. Bishop as far from being settled, the authorities being irreconcilably conflicting.

At first thought, the cases would seem to be similar, but it is only when we forget the broad distinction between a case in which a new trial has been granted, and one in which the judgment has been arrested.

A new trial is defined to be a re-examination of the issues in the same court, and is granted on the ground of error in the rulings or charge of the court, misconduct on part of the jury, etc. By arrest of judgment is meant the refusal of the court to enter a judgment where there is error appearing on the face of the record, which vitiates the proceedings.

In the case of a new trial the record remains, and the defendant is tried again on the same indictment. If the judgment is arrested, all the proceedings will be set aside, and judgment of acquittal will be given, and the defendant placed in the same situation in which he was before the indictment was found. But it will be no bar to a subsequent indictment, which the prosecutor may immediately prefer. 1 Bishop's Crim. Pro., §1110; 1 Arch's Crim. Pro., 672.

I am, therefore, unable to find anything in the authorities on the question of new trials, cited in support of this demurrer, that throws much light upon its determination.

If the record of the former trial was, by the arrest of the judgment, adjudged vicious, and all the proceedings thereby set aside, on what does defendant base his plea of *autrefois acquit*? On a vitiated record? On proceedings which, on his own motion, have been set aside? On what principle can it be insisted that a party can



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claim any right under, or base any plea on, an annulled record, or proceedings that have been vacated?

If, upon the arrest of the judgment, defendant was placed in the same situation in which he was before the indictment was found, how can it be said that he has been acquitted of a crime of which he is not then charged, and never has, in contemplation of law, been charged?

The plea of former acquittal is allowed and sustained on the maxim of common law, that no one shall be brought into jeopardy more than once for the same offense, which is in substance the provision found in our Federal and State constitutions. But counsel for defendant cite and rely upon § 4, chap. 2, Criminal code of 1862-3, as extending and enlarging the causes for, or circumstances in, which jeopardy attaches. That statute reads as follows:

"No person shall be held to answer on a second indictment for an offense of which he has been acquitted by the jury upon the facts and merits on a former trial; but such acquittal may be pleaded by him in bar of any subsequent prosecution for the same offense, notwithstanding any defect in the form, or in the substance of the indictment on which he was acquitted." And § 9, chap. 23, *ibid*, is to the same effect.

What is the meaning of this common law maxim, as we find it embodied in the constitution?

Judge Story, in commenting on this provision, uses the following terse and comprehensive language:

"The effect of it is, that a party shall not be tried a second time for the same offense, after he has once been convicted or acquitted of the offense charged, by the verdict of a jury, and judgment has passed thereon for or against him. But it does not mean that he shall not be tried for the offense a second time, if the jury have been discharged without any verdict, or, if having given a verdict, judgment has been arrested upon it, or a new trial has been granted in his favor, for in such a case, his life or limb cannot judicially be said to be in jeopardy." (Story on the Const., § 1787.)

When an original indictment is quashed, adjudged bad on demurrer, or when judgment thereon is arrested for a defect therein, it is held that the accused has not thereby been in jeopardy within the meaning of that maxim. (*Commonwealth v. Gould*, 12 Gray, 171.)

Then, following these authorities, if on the arrest of judgment it is held there has been no legal jeopardy, it inevitably follows that the judgment of conviction or acquittal would be no bar to a subsequent prosecution for the same offense, unless the statute referred to has changed the rule.

Let us examine this statute for a moment. At common law if a party were placed on trial on an indictment defective in form or in substance, and even absolutely acquitted on the merits, he might again be indicted and put upon trial for the same offense, on the ground that no legal jeopardy had attached. This statute simply changes that rule, and provides that legal jeopardy shall attach, where at common law it did not; and if the accused is tried and acquitted upon the merits of the offense charged, on an indictment defective in form or in substance, that judgment of acquittal shall be as complete a bar to any further prosecution for the same of-

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fense, as if the indictment had been in every respect free from defects in form or in substance. In my judgment, that is the effect of that statute; that is what it means—nothing more and nothing less. It leaves untouched and uncharged the effect of an arrest of judgment, or the granting of a new trial. The words “form and substance of the indictment” relate only to the indictment itself, and not to anything in the record anterior to the finding of it, and cannot by construction be extended to, and made to include any irregularities in the organization of the grand jury, that may render it an illegal body, and its acts void.

If the defendant had been tried on the first indictment and acquitted on the merits of the offense charged, by a verdict of the jury, that acquittal would have been a bar to another indictment for the same offense, “notwithstanding any defect in the form or in the substance” of the first indictment. “But the effect of quashing an indictment is like that of a *vol. pros.* of it, or of its being adjudged bad on demurrer, or of an arrest of judgment for a defect therein after a verdict of guilty has been returned; by neither of which is a defendant acquitted of the offense with which the indictment charged him, but is exempted only from liability on that indictment.” (*Commonwealth v. Gould*, supra.)

Leaving out of view for the present the effect of the arrest of the judgment, let us inquire whether the defendant was, in the legal sense and within the purview of this statute, *acquitted of the offense charged*. And I unhesitatingly answer no, he was not.

The word “offense,” in criminal law, means the doing that which a penal law forbids to be done, or omitting to do what it commands. In this sense it is nearly synonymous with crime. (Bouvier's Law Dic.)

It is a unit, a single offense, and not a series of offenses, or divers and sundry crimes. The act which originated the offense or crime charged in the indictment on which defendant was formerly tried, was a single homicide, related to the same person killed and to one act of killing. (*Lesslie v. The State*, 18 Ohio St., 390.)

In one sense the degree of the crime might be said to attach solely to the criminal and not to the crime; and in order to ascertain the degree of criminality which attaches, it must first be found that a crime has been committed, and then ascertain by whom committed. The circumstances connected with the commission of the offense, will determine the degree of criminality which attaches to the criminal. The arraignment of the defendant is for but one offense; he can, therefore, be found guilty of but one crime, and subjected to but one punishment.

The only effect, therefore—if this were a case in which a new trial had been granted—that could be given to so much of the verdict as acquitted defendant of murder, after the rest of the verdict had been set aside, would be to regard it as finding the degree of a crime before it has been determined who is the criminal, or that any crime whatever has been committed.

In other words, if this part of the verdict acquitting the defendant of murder stands, the rule governing all trials for criminal offenses has been reversed, and the degree of criminality determined, while we are yet in the dark as to whether an offense has been committed or if so who is the guilty party.

The question of fact submitted to the jury on the former trial, was whether a criminal homicide had been committed and if so whether the circumstances of aggravation were such as to raise it above or sink it below the grade of man-

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slaughter in the first degree. If the finding as to the main fact be set aside, the finding as to the circumstances necessarily go with it.

There can be no legal determination of the character of the malice of the defendant in respect to a homicide, which he is not found to have committed, or rather of which, under his plea of not guilty, he is, in law, presumed to be innocent. (*State v. Bekimer*, 20 Ohio St., 572.)

If this reasoning holds good in a case where judgment is reversed and a new trial ordered, *a fortiori* will it where the judgment has been arrested.

It is not pretended, in the argument at least, that the defendant was acquitted of the offense charged, to-wit: a criminal homicide. He is not acquitted of the felonious act of killing; of what then has he been acquitted? Of a degree of a crime? Is that in any sense an acquittal of the offense charged, within the legal acceptance of the term? And yet that is the inevitable conclusion to which we would be driven.

If this part of the verdict, to-wit: "We, the jury, do not find the defendant, Peter P. Wintermute, guilty of murder," is to stand, while the remainder is swept away, it must mean one of two things—either that the jury found if a murder had been committed, which they do not find, defendant did not commit it, or if he did commit it, which they do not find, it was not murder, which would be simple nonsense; or it is an absolute acquittal of the offense charged, for if absolutely acquitted of murder, the greater including the less, he is also acquitted of all the lower degrees which are included in it. And from this conclusion there is possibly no escape. Section 10, chap. 23, Criminal Code of 1862-3, provides: "When the defendant shall have been convicted or acquitted, upon an indictment for an offense consisting of different degrees, the conviction or acquittal is a bar to another indictment for the offense charged in the former, or for any inferior degree of that offense, etc."

I think I have shown the fallacy of the reasoning by which this portion of the verdict is claimed to be in any sense an acquittal of the offense charged and the baneful results that would follow such a construction.

But counsel for defendant insist that there were in effect, and in contemplation of law, two separate and distinct verdicts rendered in this case on the former trial. If that be true then there must have been more than one issue tried, more than one offense charged, and if he could be acquitted of one and convicted of the other, why could he not be convicted of both by two separate and distinct verdicts, two judgments pronounced against him, and he subjected to two punishments, or to be punished twice; first, imprisoned in the penitentiary for the term of ten years on one, and then taken out and hanged on the other. Such a proposition needs no refutation. But in fact there was but one issue joined; but one offense charged. Defendant could be subjected to but one punishment, or rather punished but once, and if the jury found the defendant guilty, the degree of criminality which they found to attach, would be incidental, and in no sense constitute a separate and distinct verdict. And the fact that the jury in express language say, "we, the jury, do not find the defendant, Peter P. Wintermute, guilty of murder," makes the case no stronger than if they had simply said, "we, the jury, find the defendant guilty of manslaughter in the first degree," without making any mention of the higher degree.

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If the jury by their verdict convicted him of manslaughter, that judgment if not reversed or arrested, would be a bar to a prosecution for murder; if by their verdict they absolutely acquitted him of the crime of murder, that would be a bar to a prosecution for manslaughter; now unite them, *quere*, on what principle of law or reason can they stand together?

In Hurley's case (6 Ohio, 400) the indictment contained three counts. The first charged him with murder in the first degree; the second with murder in the second degree, and the third with manslaughter. The record shows that the jury returned into court and reported that they had agreed that the defendant was not guilty on the first count, but that they could not agree on the other counts. The defendant moved the court to enter on the journal the verdict of the jury as to the first count, which the court refused. The Supreme Court declared there was no error; that a verdict in either a civil or criminal case must be considered an entire thing, that the finding was in law no verdict, and the court did not err in rejecting it altogether. And it is laid down as the general rule that if the jury find only part of the issue, judgment cannot be entered on the verdict.

If the verdict could not be received without a finding as to the minor grades of offense, it is not perceived how it can stand and have effect after the findings as to these grades have been set aside. (*State v. Behimer*, supra; *Lesslie v. The State*, supra, and authorities cited in these cases.)

I am, therefore, clear in the opinion, and so hold, that the former verdict in this case was an entirety, a unit, not severable, and in all its parts must stand or fall together.

Much has been said by counsel to the effect that defendant did not ask to have the judgment of acquittal arrested, that his application was only as broad as his necessities. The legal and legitimate result or effect of a pleading is not to be measured or governed by the wish or desire of the pleader, and if the duplex character of the verdict were admitted as insisted upon by defendant's counsel, their position on this point would not be tenable. A verdict of acquittal on the merits of the offense charged, even though the indictment be defective in form and in substance, is conclusive as against the people; but if for reasons of his own, if such a case were possible after such acquittal, defendant lays his hand on the record, and at his own instance and request it is adjudged vicious, and all the proceedings set aside and annulled, he must take the consequences. He will not be permitted to say it is vitiated and annulled for one purpose, and good and valid for another. If he take hold of the pillars to demolish the edifice for the purpose of getting rid of an enemy, he will do it at the risk of destroying a friend, if there be one within its walls.

I shall, therefore, overrule the demurrer.

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## CITY OF ELK POINT V. VAUGHN.

1. **MUNICIPAL CORPORATIONS: POWER TO CREATE: CONGRESSIONAL RESTRICTIONS.** The Act of Congress, approved March 2d, 1867, which provides that the Legislative Assemblies of the several Territories shall not grant private charters or especial privileges, has no application to municipal corporations.
2. ———: ———: ———. The City of Elk Point is a public corporation, and the term "especial privileges" refers to the granting of monopolies, such as ferries, trade marks, the exclusive right to manufacture certain articles, or carry on certain business in a particular locality to the exclusion of others. And the granting of a public charter does not confer any especial privilege within the meaning of that act.
3. ———: ———: **POWERS.** The authority to pass by-laws and to regulate the internal affairs and policy of a municipal corporation are incident to its existence.
4. ———: ———: **ORGANIZATION: VALIDITY.** The validity of a corporate organization cannot be questioned in a prosecution for the violation of one of its ordinances. Evidence that the corporation is acting as such is all that is required.
5. ———: ———: **INTOXICATING LIQUORS: SALE: POWER TO LICENSE.** In the absence of controlling general legislation respecting the sale of intoxicating liquors, it is competent for cities and towns to require a corporate license of persons who may desire to sell such liquors, and to punish persons selling without license. The powers exercised by municipal corporations are super-added to those exercised by the Territory in the same locality.
6. ———: ———: **ORDINANCE: VALIDITY.** To render the whole ordinance void the good and bad parts must be essentially and inseparably connected in substance. If omitting the void part, that which remains is complete in itself and capable of being executed, it must be sustained.
7. ———: ———: ———: ———. The validity of an ordinance is a question for the court, and evidence tending to show that the amount of the license is unreasonable, should be excluded from the jury.
8. ———: ———: **DISCRETIONARY POWERS: ABUSE.** Municipal corporations are clothed with large discretionary powers in relation to police matters, and courts will not interfere with the exercise of these powers, except in clear cases of abuse.
9. **COUNTY LICENSE: SALE UNDER: DEFENSE.** County license is no bar to a prosecution for the violation of a city ordinance punishing the sale of intoxicating liquors without a city license, and such county license was properly excluded when offered in evidence on the trial. The sale of intoxicating liquors without a county license is a separate and distinct offense.
10. **INTOXICATING LIQUORS: SALE ON THE SABBATH: PUNISHMENT.** The sale of intoxicating liquors on the Sabbath without a city license, is a violation of an ordinance requiring such license, for which the offender may be prosecuted, notwithstanding the same act may be a violation of the Territorial law, and the party be liable to punishment thereunder.

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*Appeal from Union County District Court.*

THIS action was instituted by the city of Elk Point, a municipal corporation, created by special charter, against the defendant, for an alleged violation of an ordinance of said city, prohibiting the sale of intoxicating liquors without a city license. The action was tried before the city justice, defendant found guilty and sentenced to pay a fine of fifty dollars, from which defendant appealed to the District Court. Trial was there had to a jury, which resulted in a verdict of guilty. Motions for a new trial and in arrest of judgment were made, and overruled by the court *pro forma*, to which ruling defendant excepted. Judgment was pronounced on the verdict, and defendant appeals.

*E. W. Miller and Joy & Wright*, for appellant.

The act incorporating the city of Elk Point, approved January 10, 1873, under which said ordinance was passed is void, for that the laws of the United States, prohibit the Territorial legislature from conferring especial privileges upon any municipal corporation. (U. S. Statutes at Large, Vol. 14, page 426, approved March 2d, 1867; 1 Dillon on Mu. Cor., § 18, note 1, §§ 19, 20, note 1.) The defendant on the trial offered to prove that at the time said incorporation act was passed, and at the time of the passage of said ordinance, he held a license from the proper authorities of Union county, to sell liquors by the measure, under the provisions of the general laws of the Territory. This evidence the court excluded, which we urge was error. It is a well established doctrine, sustained by numerous decisions, that when there are general laws of the State or Territory respecting the sale of intoxicating liquors, a corporation, city or town therein is not authorized to pass an ordinance requiring a corporate license and punish persons selling, without a license from said corporation; and this is so even when there is a general power in the corporation to make by-laws and pass ordinances to preserve the peace, good order, etc. (Dillon on Mu. Cor., § 298, and cases cited in note; *Commonwealth v. Turner*, 1 Cush.,

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493; *United States v. Hart*, Pet. C. C., 390; *Thompson v. Carroll*, 22 Howard, 422; *Commonwealth v. Dow*, 11 Met., 382; *Savannah v. Hussey*, 21 Ga., 80.) It is equally well settled that where the commission of an act is an indictable offense under the general laws of the United States, a municipal corporation has no power to impose a penalty for the commission of a similar act. (Dillon on Mu. Cor., 313, and cases cited in note.) Under the theory of the prosecution defendant could be prosecuted for the commission of the same act under said ordinance on the one hand, and the general laws of the State on the other. If the defendant was indicted for an offense under the laws of the Territory, we hold he could not plead his acquittal or conviction on a trial had under and by virtue of said ordinance, in bar. And if he could not, he would be subject to be tried twice for the same offense. (*City of Burlington v. Keller*, 18 Iowa, 65; Dillon on Mu. Cor., §§ 263, 302, and par. 3, 5, 6, 7 and 9, to note 1; Cooley on Const'l Lim., 200, note; 9 Mo., 692; 2 Dong. (Mich.) 384.) The city could pass no ordinance except what the incorporation act itself gave them the authority to do by express terms. Subdivision 4, § 10, is the only provision in that incorporation act relative to the levy and collection of license from liquor dealers. It provides that there shall be a tax collected. There is no provision anywhere in that act or any other which gives the power, express or implied, to enact the ordinance punishing parties for their failure to obtain license. (Cooley on Const'l Lim., 194-5; Dillon on Mu. Cor., § 354, and note; *City of Mt. Pleasant v. Breeze*, 11 Iowa, 400; *City of Burlington v. Keller*, 18 Iowa, 65; Sedgwick on Statutory and Const'l Law, 473.)

*Alex. Hughes*, for appellee.

The charter of a municipal corporation is its organic act. (1 Dillon on Mu. Cor., § 53.) The powers of a municipal corporation are of three classes, as follows:

1. Those granted in express terms.
2. Those necessarily or fairly implied in or incident to the powers expressly granted.

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3. Those essential to the declared objects and purposes of the corporation, or those powers which they derive from a general grant of authority. (1 Dillon on Mu. Cor., § 55.)

There is a marked distinction between the grant of a power to do a specified act, and the power incident to a corporation, or those powers derived from a general grant of authority. (1 Dillon on Mu. Cor., §§ 262, 302, 298, (note) 250, (note) 253, 254.) Where the State provides a special law for corporations, or authorizes them to provide special regulations for themselves, there is no conflict between ordinances and statutes. (1 Dillon on Mu. Cor., §§ 301, 302, 298, 299; 1 Wend., 261; Cooley, 199, and note; 4 Denio, 341; 36 Ills., 305; 12 Ind., 584.) It is competent for the legislature to delegate to municipal corporations the power to regulate, restrain and even suppress particular branches of business, if deemed necessary for the public good. (1 Dillon on Mu. Cor., §§ 95, (note) 128, (note 1); Cooley, 198, and note on page 399; 4 Denio, 346.) In prosecutions to enforce ordinances, the illegality of the corporate organization cannot be shown to defeat a recovery in such a collateral proceeding. Evidence that the corporation is acting as such is all that is required. (1 Dillon on Mu. Cor., § 357; 23 Ills., 439; 46 Ills., 10; 10 Iowa, 235 50; Ills., 39.) The Act of Congress of March 2, 1867, has no application to public corporations. (1 Dillon, § 9 and note 1, and §§ 18, 19.) The granting of a public charter does not confer any "especial privilege" within the meaning of the Act of Congress. (1 Dillon, § 9; also *ibid*, 82, note 3; Cooley, 188, 189, 190, and note 1.) The imprisonment clause in an ordinance is not an essential part of the ordinance; it may be omitted, and the ordinance be complete, without it. An ordinance may be good in part and void as to the residue. (18 Iowa, 66; 1 Wend., 261; 50 Ills., 41; 36 Ills., 416.) A statute authorizing expressly a city council to levy and collect a license tax on liquor sellers, saloon keepers, etc., is intended as a police regulation, and embraces the power to regulate, and restrain the traffic by charging a license tax. (29 Iowa, 123; 1 Dillon, §§ 291, 79, 93; 16 Wis., 566 and 298; 12 Minn., 41; 11 Mich., 43; 13 Ills., 577; 50 Ills., 69; 2 Bishop's Crimi-



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nal Law, §§ 1152, 1153.) Courts will not interfere with the exercise of the discretionary power lodged in a municipal corporation, unless a clear case of abuse is presented. (2 Penn., 29; 1 Dillon, § 261, note and §§ 59, 299; 44 Mo., 550; 1 Hill, 362; Cooley, 582.) In fixing the amount of the license tax, when not limited by the charter, the city council exercises a legislative discretion, and that discretion is not subject to judicial review. (19 Wend., 79; 15 Barber, 193; 7 Cowen, 349, and 804; Cooley, 208; 2 Iowa, 282.) A person who holds a license is bound by any subsequent legislation upon the subject, to which thereafter he must conform. (2 Bishop's Criminal Law, §§ 1130, 1132; Cooley, 584, and notes.) The court did not err in excluding county license when offered in evidence. (36 Ills., 305; 1 Wend., 261; 12 Ind., 584; 4 Denio, 341.)

KIDDER, J.—This case comes before us on an appeal from the District Court of Union county. It is for a violation of City Ordinance No. 17. It was tried first before a justice of the peace, by whom the defendant was convicted, when an appeal was taken to the District Court.

The information alleges, that the defendant sold one gallon of spirituous liquor, by measure, to one B. M. Brink, on the 26th day of July, 1874, without license or lawful authority to make such sale, and contrary to said ordinance.

The *first* section of this ordinance makes it unlawful for any person or persons, by agent or otherwise, to keep any tippling shop, dram shop or saloon in the city of Elk Point, or to sell, barter, exchange, or give away, or in any manner dispose of spirituous, vinous, or malt liquors, by the drink, or to be drank in, upon, or about the premises where sold, or in any place of public resort in said city.

The *second* and *third* sections make it unlawful to sell, barter, exchange, or give away spirituous, vinous, or malt liquors, by measure, in said city, without first obtaining a license from the proper city authorities, which license permits the person to whom it is issued to sell said liquors by measure at one place of business in said city, for one year from the first day of July succeeding the date of its issue.

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It is also provided therein, that the party applying for such license shall pay the sum of five hundred dollars therefor to the treasurer of the city.

The appellant was convicted in the District Court, and sentenced to pay a fine of seventy-five dollars, and to stand committed to the city jail until said fine should be paid.

The appellant insists that this ordinance is void for several reasons:

1. That the act incorporating the city of Elk Point, approved January 10th, 1873, in pursuance of which this ordinance was passed, is void on the ground that the Act of Congress, approved March 2d, 1867, provides, that "the Legislative Assemblies of the several Territories, shall not, after the passage of this act, grant private charters or especial privileges."

This act, in our judgment, has no application to this case. The city of Elk Point is a *public* corporation. (1 Dillon, § 9 to 19, and note.) The term "*especial privileges*" refers to the granting of monopolies, such as ferries, trade marks; the exclusive right to manufacture certain articles, or to carry on certain business in a particular locality to the exclusion of others. The granting of a public charter does not confer any "*especial privileges*" within the meaning of this act. To construe it otherwise would deny the power of the legislature to create a township, or a county. The authority to pass by-laws and to regulate the internal affairs and police of a municipal corporation are incident to its existence.

Indeed, it seems that it is unnecessary to discuss this question further, if we rely upon authorities which go so far as to settle the question, that the *validity* of a corporate organization cannot be questioned in this action. Evidence that the corporation is acting as such is all that is required. (23 Ills., 439; 46 Ills., 10; 50 Ills., 39; 10 Iowa, 235; 1 Dillon on Mu. Cor., § 351.) But we will examine the questions presented.

2. It is also claimed that the ordinance is repugnant to and in violation of the laws of the Territory.

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It is well settled by authority, that in the absence of controlling general legislation respecting the sale of intoxicating liquors, it is competent for cities and towns to require a corporate license of persons who may desire to sell such liquors, and to punish persons for selling the same without license from the proper authorities. The powers exercised by a municipal corporation are superadded to those exercised by the Territory in the same locality. (The Twelfth Ind., 584; 1 Wend., 261, and cases there cited; 36 Ills., 305; 4 Denio, 341; Cooley on Const'l Lim., 198-9, and notes; 1 Dillon, § 298 to 302, and notes on page 376; *Com. v. Turner*, 1 Cush., 493; and *Com. v. Dow*, 10 Met., 382,) are cited by the counsel for the appellant, and are relied upon to sustain him. These authorities decide, generally, that a corporation by virtue of a *general welfare* clause in its charter cannot further regulate the sale of intoxicating liquor where the subject is *fully* provided for by the laws of the State. The statutes of Massachusetts, under which many of these decisions were made, conferred but very limited powers on the corporations. There is a wide distinction between the grant of a power to pass ordinances upon specified and enumerated subjects, and the authority derived from the *general welfare* clause usually inserted in municipal charters. (1 Dillon, § 250, and notes; note 1, page 366, and §§ 253-4.)

Subdivision 4 of section 10 of the charter of the city of Elk Point, expressly authorizes the city council to levy and collect a license tax on liquor sellers and saloon keepers.

Chapter 30 of the laws of 1867-8 authorizes the county commissioners of their respective counties to collect a license on the sale of liquors in quantities of less than one quart. There is no conflict between this ordinance and the act referred to. Both are intended as police regulations. The former by virtue of the police power of the Territory, and the latter by virtue of the police power of the corporation. The authority to act in each case is given by the laws of the Territory.

The county license taken out by the appellant is no bar to a prosecution under this ordinance, and was properly ex-

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cluded when offered in evidence on the trial in the District Court. But it is urged that the county license is a contract in which the appellant had vested rights which could not be taken from him by subsequent legislation. This question has been settled by numerous decisions: a license to sell liquor is not a contract, but simply a permit to do that which it was unlawful to do without it. (Cooley on Const'l Lim.)

A person who has a license to sell liquor is bound by subsequent legislation upon the subject. (37 Maine, 517; 29 *ibid*, 442; 1 Ohio State, 15; 38 N. H., 225; 18 Missouri, 515; 26 *ibid*, 171; 28 *ibid*, 14, 19; Cooley on Const'l Lim.)

3. It is claimed that the sale of liquor without a county license is an indictable offense, and that when a sale is indictable pursuant to the laws of the Territory, a municipal corporation has no power to impose a penalty for the same act.

The sale of liquor without a county license is not an indictable offense under the statutes of this Territory. Chapter 30 of the laws of 1867-8, and chapter 25 of the laws of 1872-3 prescribe the penalty for selling liquor without a county license.

Justices of the peace have exclusive jurisdiction of all misdemeanors where the maximum punishment fixed by law does not exceed a fine of one hundred dollars, or imprisonment in the county jail 30 days, or both such fine and imprisonment. The maximum punishment fixed by law for this offense is a fine not exceeding one hundred dollars. But selling liquor without having taken out a county license is a separate and distinct offense from selling liquor without the license provided for by the ordinance under which this action was brought. The county of Union and the city of Elk Point are each expressly authorized to require a license for the sale of liquor. The authorities cited by the appellant on this point refer to cases where municipal corporations prescribe an additional penalty to the State law for acts that were *essentially* criminal, and were offenses at common law as assault and battery, larceny, etc. They do not decide that municipal corporations cannot make necessary and reason-

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able police regulations, and enforce the same by reasonable penalties. It is a power incident to the creation of these corporations.

4. Section six of said ordinance provides, that any person who shall offend against this ordinance or any of the provisions thereof shall be punished by a fine of not less than \$50, nor more than \$100, and by imprisonment in the county jail not to exceed thirty days. The appellant insists that the authority to punish a violation of this ordinance by *imprisonment* was not conferred by the charter, and that the ordinance is for this reason void. It is conceded that the sentence of the District Court is authorized by the charter and ordinance. The *charter* does not confer the power to punish a violation of this ordinance by imprisonment (except that the defendant may be committed until the fine is paid) and to this extent the ordinance is void, but the whole ordinance is not void because the penalty imposed is in excess of that which is authorized by the charter. An ordinance may be good in part and void as to the residue. To render the whole ordinance void, the good and the bad parts must be *essentially* and *inseparably* connected in *substance*. If omitting the void part that which remains is complete in itself and capable of being executed it must be sustained. (18 Iowa, 66; 1 Wend., 261; 50 Ills., 41; 36 *ibid*, 416; Cooley on Const'l Lim., 177-8 and 188; 3 Nevada, 180; 1 Dillon on Mu. Cor., § 354.) The imprisonment clause is not an *essential* part of this ordinance. It may be stricken out and the same is complete without it.

5. The appellant insists that the ordinance is void because the amount of the license is unreasonable and amounts to a prohibition, and that the authority to license the sale of spirituous liquor was not conferred by the charter. The legislature in conferring the power on the city council to levy and collect a license tax on liquor sellers, saloon keepers of any kind, and dram shops, manifestly intended this power to be exercised as a police regulation—as a restriction and regulation of the business, and not an ordinary tax for revenue only. It appears from the whole act that this was the object and purpose which was intended to be accomplished; and an

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act of incorporation, like any other act, should be construed in such a manner as will best answer the intention of the legislature. The Organic Act of the Territory requires all taxes to be uniform, but a license is not a tax in the constitutional sense of the term requiring uniformity of taxation. (16 Wis., 298; *ibid*, 566; 46 Ills., 39; 3 *ibid*, 355; 1 Dillon, notes to § 291; 1 Dillon, notes on page 394, and cases there cited.)

In fixing the amount of the license a distinction is to be made between those trades and employment which are useful, and those that are obnoxious to the health and morals of the community. The legislature must exercise its judgment concerning what acts tend to corrupt the public morals, impoverish the community, disturb the public repose, or even impair the comfort of individual members. It has assumed that the traffic is hazardous to the morals and best interests of society, and, therefore, has clothed the corporation with extensive powers in this regard. It is expressly authorized to suppress and prohibit dram shops and saloons where liquor is sold by the drink. The council is not restricted by the charter, or any other statute in determining the amount of the license. It is left largely to their discretion. The Supreme Court of Pennsylvania, say: "That where a municipal legislature has authority to act, it must be governed not by our discretion, but its own, and we shall not be hasty in convicting them of being unreasonable in the exercise of it." (2 Penn., 291.) Again, the Supreme Court of Missouri, say: "In assuming the right to judge of the reasonableness of the exercise of corporate power, courts will not look closely into matters of judgment where there may be a reasonable difference of opinion. A strong case should be made to authorize an interference on this ground. (44 Missouri, 550.) In considering this subject the Supreme Court of New York, say: "In respect to the legislative functions of a municipal body, the courts are bound to presume that they will exercise any discretion with which they are clothed properly, and that they are bound to presume that they have sufficient reason for doing an act the result of such discretion." (1 Hilton, 362; 15 Barber, 193; 19 Wend., 79 and 99; 7 Cow., 596; Cooley

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on Const'l Lim., 207-8; 1 Dillon, §§ 58 and 59, and notes.) In exercising the discretion with which they are clothed the council may properly take various matters into consideration, and where their action is not limited and controlled by statute a large discretion must necessarily be exercised. The mayor and council are elected from the body of the corporation, and it is supposed they are selected with a view to their fitness for the positions. They are familiar with the wants of the municipality and are better prepared to judge of the amount of the license which should be required than the court. We do not decide that a court should not, in *any case*, interfere, but we do not feel justified in deciding that the city council of Elk Point abused the discretion with which they were clothed in fixing the amount of the license tax at \$500. There may be instances where such discretion might be so grossly and manifestly abused, that courts might be called upon to pronounce its existence an usurpation; but when such a case shall arise, it will be the time to dispose of it by proper adjudication.

6. The appellant on the trial in the court below offered to introduce evidence *to the jury* to show the amount of sales of liquor in the city of Elk Point, and the profits thereon per annum, and also the population of the city and county of Union. This evidence was excluded by the court, and this ruling is assigned as error. The validity of an ordinance is a question for the court, and evidence to the jury to show that the amount of the license is unreasonable was properly excluded. (1 Dillon, § 261, and cases there cited.) In a case in the 12 Minn., 41, wherein the question was in relation to the validity of "an ordinance regulating and licensing butchers' shops," etc., the court say, "if it" (the ordinance) "be oppressive, the remedy, as in many other cases, lies with the legislature or common council." Again, they say: "We think the testimony offered,"—it being strikingly analogous to this—"for the purpose of showing the amount of license reasonably necessary to regulate the business in which the appellant was engaged, was properly rejected."

7. The appellant insists that because the plaintiff could

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not authorize the sale of liquor on Sunday, (the sale in this case having been made on that day) it cannot make the sale of liquor in the city on Sunday an offense and prescribe a punishment therefor by ordinance.

This argument is based upon the theory that the city cannot make an act punishable which it is not empowered to authorize or make legal.

Chapter 25 of the Statutes of 1863-4, page 62, Sec. 2, prohibits the sale of liquors "on the Sabbath day or Sunday," and prescribes a penalty for its violation. This law was passed by virtue of the *police* power vested in the Legislative Assembly of the Territory. The municipality of the city of Elk Point is also vested with a police power, and is authorized by its charter to prohibit and regulate the sale of liquors. The defendant violated the laws of the Territory, and also the city ordinance in selling on Sunday, and was liable to a prosecution therefor under either or both. They are separate and distinct offenses—one against the statute of the Territory, the other against the ordinance of the plaintiff.

The city cannot authorize or make legal the sale of liquors therein because the Territorial law prohibits the sale without a license from the county; yet it is competent for the city to further regulate and even prohibit the sale by the drink.

To illustrate: The sale of liquors is not allowed on election days, or to minors. Suppose the testimony had disclosed that the sale was made on election day, or that the vendee was a minor, would not the defendant have been liable under the ordinances?

The same act may constitute two offenses and the defendant be liable to a punishment for both. Selling liquor on the Sabbath day is an offense against the peace and dignity of the people of the Territory, and is likewise a violation of the ordinance.

The ordinance makes it unlawful to sell liquor *in any manner* in violation of its provisions. If the defendant had taken out a city license, he *then* would have been liable under the Territorial statute, but not under the ordinance.

No error being apparent in the record, the judgment of the court below is

**AFFIRMED.**



Yankton County vs. Rossteuscher.

## YANKTON COUNTY V. ROSSTEUSCHER.

1	125
1	94
2	147
46*	575
2*	487
46*	705

1. **EVIDENCE: IMPROPER: EFFECT.** The appellate court will not inquire whether the improper evidence received, did in fact prejudice the objecting party, but whether it could reasonably and properly have been so understood by the jury as to prejudice him.
2. ———: ———: **NEW TRIAL.** Where it is apparent that the jury may have fairly and reasonably understood the improper evidence, in a way to injuriously prejudice the party objecting, a new trial must be granted.

*Appeal from Bon Homme County District Court.*

THE facts in the case are fully stated in the opinion of the court.

*Bartlett Tripp and S. L. Spink, for appellant.*

It was error to introduce the record of county warrants in evidence. It is not a book required to be kept by statute, and was shown by the evidence not to have been a book of original entry, but was copied by Jas. S. Foster sometime afterwards. See Foster's testimony. (Laws of 1868-9, page 170, § 8; laws of 1862, page 255, §§ 7 and 9; 1 Greenleaf's Evidence, 539, § 493; *ibid*, 529, 484; 4 U. S. Dig., 676, par. 389.) The court erred in admitting testimony, showing or tending to show that plaintiff had paid the amount sued for in this action to Mills & Co. or their agent. The evidence offered must correspond with the allegations and be confined to the point in issue, and this rule supposes the allegations to be material and necessary. (1 Greenleaf's Evidence, 62, § 51.) And the issue in this case *was* and the *only* issue to be tried, was: did this defendant have money in his hands at the commencement of this action, belonging to this plaintiff, due and unpaid? Defendant could not be bound by any action of plaintiff in paying or refusing to pay Mills & Co., to which he was not a party. The receipt of Boyer, Ex. "B." The minute book showing entry July 8, 1870, authorizing payment of the judgment of Mills & Co., and the stub book of

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warrants to show the issue of warrants to pay such judgment, nor the judgment v. Yankton county did not in any way tend to prove the issues of this case; for, suppose Yankton county did pay Mills & Co., or that they were even required by execution to pay them for these books, such action cannot bind defendant unless he was party thereto. Such action might be fraudulent, unjust, or the judgment illegally obtained. Nor is the objection answered by saying it was in proof of some allegation of the complaint, for any allegation of the complaint that plaintiff had been required to, and had paid the amount thereof to Mills & Co., is not a material allegation, but were surplusage and no proof objected to can be introduced in its support, (15 Iowa 146) and if material it was not the best evidence. (2 Phil. notes to Ev., n. 479, page 639.) The court erred in allowing the account of Mills & Co. to be introduced in evidence, marked "C." It is not an original entry, does not purport nor is it sworn to be a copy of any book of original entry. It is not the account sued in this case, and from its date—August 13, 1868—it is shown to have been made out long after the transaction of the sale of books. It tended to prove no issue involved in this case, but did, though immaterial to prove the allegations of the complaint, tend to prejudice the defense in that the bill was made out to Yankton county instead of to A. F. Hayward, as defendant swears the original bill *was*. The account was wholly irrelevant and incompetent, and the court cannot say how far this and *other* incompetent testimony may have influenced the jury, for the rule is well settled as laid down by Judge Allen, (*Baird v. Gillett*, 47 N. Y., 186,) "if illegal evidence is admitted which bears in the least degree on the result, it is fatal." (*Baird v. Gillett*, 47 N. Y., 186; *Starbird v. Barrows*, 43 N. Y., 200; *Warrall v. Parmalee*, 1 N. Y., 519; 3 Cowen, 612; 4 Wait Practice, 239, and citations; 20 Wis., 615.) It was error to allow the letter of Hayward, marked "F," to go to the jury. The testimony had closed—it was not rebutting; it was wholly incompetent to introduce the letter of a third party to bind this defendant. It is not shown to be written at the request or dictation of defendant. If he was *even* the deputy of de-

## Yankton County vs. Rossteuscher.

defendant, it does not appear he was so at that time. He, himself, swears he "acted as such, but does not know how long." But if he were acting as deputy, such fact must be proved, especially when the act does not come within the scope of his legitimate duties, and is, moreover, hostile to interests of the principal; but the letter itself rebuts any presumption of agency, and breathes a spirit of independence, even of enmity, to this defendant. It casts insinuations upon this defendant, the effect of which it is not the province of the court to determine. It is sufficient that the testimony was incompetent, and the defendant may have sustained injury thereby. (25 Texas, sup., 20; 4 U. S. Dig., 685, par. 609; 4 U. S. Dig., 714, par. 1326 and 1327; 2 Clinton's Dig., 1187, par. 527; *ibid.*, 1203, par. 715; 7 Wend., 446; 13 Barber, 246; 2 Clinton's Dig., 1204, par. 722; 5 Howard, 29.) The complaint does not state facts sufficient to constitute a cause of action, and defendant can raise this objection for the first time in the appellate court, and is not required to raise the objection by the demurrer in the court below. (Wait's An. Code, 241, note i. & o. cases cited; Code of 1867-8, page 31 § 101.)

*Moody & Cramer*, for appellee.

The record of county warrants issued was received in connection with the evidence of Iverson, the county clerk, who had the custody of all the county records of James S. Foster, the former clerk, who made the entry therein affecting this case, and was properly received. The evidence relating to the recovery by Mills & Co. against the county for the value of the books for which this order was issued by defendant, and of the payment of such judgment was all properly received for the purpose of proving the material allegations of the plaintiff's complaint, to-wit: that the county was required to pay and did pay Mills & Co. for the books, and to rebut the presumption that defendant issued the order for the purpose for which it was issued, and further for the purpose of excusing the demand upon the defendant that he should use it for that purpose if such demand had been deemed necessary.

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Again, if either or all of such testimony had been *improperly* admitted it could have done defendant no harm, for such testimony tended to establish what as his Honor says in his charge, and as the testimony of the defendant as well as the plaintiff shows, conclusively; and, indeed, as was conceded on the trial were the facts, that said order was issued to pay for those books, that such books were purchased of Mills & Co., and that Mills & Co. were paid by the county and not by the use of this order.

BARNES, J.—This action was commenced in Yankton county, and by change of venue removed to Bon Homme county, and there tried. The jury found for the plaintiff. Various exceptions were taken in the court below upon the admission of testimony and refusal of the court to instruct the jury as requested by defendant. This cause is now in this court for review. It is alleged in plaintiff's complaint that in June, 1865, the defendant was the register of deeds of Yankton county and clerk of the board of county commissioners of said county; that while acting as such clerk he caused to be issued by said board a county warrant or order for the sum of ninety-eight dollars, payable to one A. F. Hayward; that the defendant procured said order to be issued for the pretended purpose of paying that sum to the firm of Mills & Co. for books theretofore purchased of said firm for Yankton county; that defendant did indorse said county order for the purpose of paying said Mills & Co., but in fact presented the same to the treasurer of said county and received the amount thereof of said county, for which sum so received from said county by said defendant, this action is brought by said county against said defendant.

The defendant specifically denies every material allegation of complaint. This cause was tried at Bon Homme, June 10, 1873, BARNES, J., presiding. Upon the trial of this cause the plaintiff offered in evidence a letter in the words and figures following. To the reception of this letter the defendant objected. The court below overruled the objection and allowed the letter to be read in evidence. To this ruling the defendant then and there excepted.

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## COPY OF LETTER.

YANKTON, D. T., 3d May, 1865.

*Messrs. Mills & Co.*

GENTS: There has been considerable talk among the county and other officials with regard to the new books; (mark me) the fault is only against the county clerk (who gave me the order) and not with your prices or the quality of the books. But the books are altogether too extensive for our county. And several have been to me and advised me to countermand the balance of the order and leave it in the hands of the clerk, which I will now do; but will do my best to get him to do the fair thing with you.

I am, respectfully,

Yours in haste,

A. F. HAYWARD.

The fact that at the time the ninety-eight dollar order was issued to Hayward to pay Mills & Co., defendant was clerk of the board of county commissioners is admitted upon the trial in the court below. So, too, the fact that the witness, Hayward, the writer of the foregoing letter, was the duly appointed deputy clerk of said board of county commissioners, by appointment from the defendant, is fully established. The fact too that defendant knew that the ninety-eight dollar order was drawn in favor of Hayward to pay for the books purchased of Mills & Co., is fully and clearly established. The theory of the plaintiff is this: that the defendant purchased the books, for which this ninety-eight dollar order was given, of Mills & Co., for Yankton county, and that the order was drawn in favor of Hayward, who was then defendant's deputy, to be passed over to Mills & Co. in payment for the books.

The defendant's position is this: that Hayward (not as deputy clerk, acting in the place and stead of defendant) but acting for himself and on his own account, purchased the books in question from Mills & Co. for Yankton county, and afterwards sold them to defendant for the county; and that this ninety-eight dollar order was drawn in favor of Hayward to pay him (Hayward) for the books. That the order therefor was the individual order of Hayward, and thereafter, in the ordinary course of business, was purchased by defendant of Hayward.

Without examining the testimony in this case, proving or disproving either theory, it is sufficient to say that there is

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Yankton County vs. Rossteuscher.

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some evidence tending to sustain the theory of defendant. Hayward was a witness upon the trial of this cause, and is not a party to this suit. And we are at loss to discover upon what view of this case the court below could have allowed the foregoing letter as evidence in this case. It will hardly be claimed that it was an official act of Hayward, as defendant's deputy, and is, therefore, binding on defendant, and is to be treated as defendant's own act, the same as though written by defendant himself. The character of the letter itself is inconsistent with this view of the case. We are, therefore, clearly of the opinion that this letter was improperly received in evidence.

A more difficult question for this court to determine, however, is this: could this improper evidence, by any fair and reasonable construction, have prejudiced defendant? It is not enough that the evidence is improper; but before reversing judgment or ordering a new trial, the court must be satisfied that the improper evidence may have prejudiced the complaining party. While on a careful examination of that letter we think it tends quite as strongly to establish the defendant's theory of this transaction, as it does to establish that of the plaintiff, it is impossible for the court to determine what interpretation the jury put upon it when they viewed it. And as it is apparent that the jury may have fairly and reasonably understood that letter, that it injuriously prejudiced the defendant, we think a new trial must be granted.

This case comes fairly within the rule as recognized and declared in the cases cited by defendant's counsel, under his third and fifth point, to wit: (47 N. Y., 186; 43 N. Y., 200; 4 Wait's practice, 239, and cases there cited.) Without extending this investigation further we think that improper evidence has been admitted, to which the objecting party has excepted.

The appellate court will not inquire whether the improper evidence thus received did in fact prejudice the objecting party, but will determine whether it could reasonably and properly have been so understood by the jury as to prejudice the objecting party. Applying that rule we think the jury could

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reasonably have placed such construction upon the letter of Hayward, that the defendant would be prejudiced by its reception.

It is unnecessary to examine other questions presented by the bill of exceptions. As for the reason above stated, if for no other, a new trial must be granted.

Rule accordingly.

1	131
1a	111
1b	117
46*	508
45*	194
45*	196

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JUNE TERM, 1875.

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PRESENT:

HON. PETER C. SHANNON, CHIEF JUSTICE.

HON. ALANSON H. BARNES,

HON. GRANVILLE G. BENNETT,

} ASSOCIATE JUSTICES.

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FROST, ET AL V. FLICK.

1. **OFFICERS: OFFICIAL DUTIES: NEGLIGENCE.** The neglect by a county officer of his official duty, cannot be made the grounds of a proceeding in chancery by a private citizen, unless damaged by such action, or thereby deprived of some substantial right.
2. **TAXATION: OBJECTS AND PURPOSES: IRREGULARITIES.** The object of taxation is the raising of revenue for governmental purposes; if the same end is accomplished, even though the proceedings may be irregular, that would have been reached had all the forms of the law been strictly complied with, equity cannot be invoked to undo, or restrain from the doing of, that which it was the object and purpose of the law to accomplish.
3. **TAXES: SALE OF REAL ESTATE: RIGHTS OF PARTIES.** The right of a party under the statute providing that "no real estate belonging to any person shall be sold for taxes while personal property belonging to such person can be found by the treasurer or collector," is a personal right, of the violation of which the tax payer alone can complain, and of which no third party can be allowed to take advantage.
4. **LEVY AND COLLECTION: LEGAL PROCEEDINGS.** The levy and collection of taxes are legal proceedings under the statute, for the purpose of apportioning

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and enforcing a recognized obligation due the public, and can no more be interfered with or regulated by courts of equity, than can proceedings at law upon private claims.

5. **COURTS OF EQUITY: POWERS: JURISDICTION.** Courts of equity do not sit to reverse or correct errors and mistakes of law, and cannot attempt to prevent, any more than it will redress, all wrongs.
6. ———: ———. Equity will not interfere by injunction to restrain the enforcement of tax proceedings on the ground of irregularities in the assessment of the tax, or in the execution of the power conferred upon taxing officers.
7. **TAX: ILLEGALITY: COLLECTION WHEN RESTRAINED.** Courts of equity will interfere by injunction to restrain the collection of a tax, when it is illegal or unauthorized, or when the property assessed is not subject to the tax, or where fraud has been practiced by the taxing officers.
8. ———: ———: ———. Before an injunction will issue to restrain the collector of a tax, it must clearly appear that the tax is not such an indebtedness as the duty of the citizen, defined and regulated by law, requires him to discharge.
9. ———: ———: ———. In no case will the collection of a tax be enjoined where it is not shown that the injury resulting from its enforcement would be irreparable, and this fact must appear in the bill by issuable averments.

*Appeal from Yankton County District Court.*

THIS is a proceeding in equity to restrain the sale, by the treasurer of Yankton county, of certain real estate, for the taxes of 1869, 1870, 1871 and 1872, on the grounds of certain irregularities, viz.:

1. That no assessment roll was made out and delivered to the county clerk as required by section 24, chapter 25, laws of 1868-9.
2. That plaintiffs' grantors had at the time the taxes became due, and still have personal property sufficient to satisfy the same, and that the sale or attempted sale of the real estate, without first exhausting such personal property, is in violation of section 59, same act.

To the complaint defendant demurred on the ground, "that said complaint does not state facts sufficient to constitute a cause of action in favor of plaintiffs, against defendant." Other grounds are stated in the demurrer but not urged.

The demurrer was sustained and plaintiffs appeal.



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*C. J. B. Harris*, for appellants.

The assessments must be made out and delivered to the clerk of the county of Yankton on or before the 1st Monday of April in each year. (Sec. 24, chap. 25, laws of 1868-9, page 272.) Section 27 of the same act provides, that the board of equalization shall have a session of not less than two days at the county seat, commencing on the 1st Monday in April in each year, for the purpose of correcting the assessment roll in their county. An important right is thereby secured to the tax payer, and if the returns are not made the tax payer is deprived of a substantial right and the assessment is void. (Blackwell on Tax T., 118 and 123; 7 Conn., 550; 3 U. S. Dig., 508, § 133; 14 Ills., 223; 14 U. S. Dig., 547, § 87.) Without a valid assessment made and returned within the time, and as by law provided, there can be no valid levy of taxes. (Blackwell on Tax T., 106.) Had the taxes on said real estate been legal, the advertising and offering the same for sale, before exhausting the personal property subject to seizure and sale, for the payment of said taxes at the time the said taxes became due, and at the time they were offered for sale, is in violation of the express provisions of the statute, and illegal and void. (Sec. 59, laws of 1868-9, 288; Blackwell on Tax T., 176-7, and cases cited; *Yancy v. Hopkins*; 1 Munford, 419; 2 U. S. Eq. Dig., 606, § 15.) Courts of equity will interfere by injunction to restrain an illegal tax sale. (Blackwell on Tax T., 481-3; Hilliard on Injunctions, 455; 18 Iowa, 70; 30 Ohio, 73; Nash's Prac., 440, and cases there cited; 1 Central Law Journal, 267, *Tilton v. Or. C. M. R. Co.*; 49 N. Y., 243, *Clark v. Norton, et al*; 28 Wis., 583, *Juld, et al v. Town of Fox Lake*; 36 Ind., 175, *Shoemaker v. Commissioners Grant Co.*; U. S. Dig., 1873, page 374, § 40; U. S. Dig., 1872, page 669, § 67; *ibid*, 360, § 45; U. S. Dig., 1871, page 666, § 66; *ibid*, 672, § 157; laws of 1868-9, page 262, chap. 25; *ibid*, 291, §§ 64 and 71.)

*Moody & Cramer*, for appellee.

The grounds upon which relief is asked, are:

1. Because plaintiffs' grantors had personal property, out of which the tax could have been made.

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## 2. Irregularities in the assessment of the tax.

We submit that neither furnish a reason for the interference of a court of equity to enjoin the collection of the tax. It is only when the tax assessed is itself wholly *illegal* and *unauthorized by law* that courts of equity interfere to prevent a cloud upon title, and not where the tax being authorized and valid as in this instance some irregularities may have crept in in the manner of its assessment. (*Hallenback v. Hahn*, 2 Neb., 424, and authorities there cited; *High on Inj.*, §§ 355 and 356, and notes; *MacIot v. Davenport*, 17 Iowa, 379; *Warden v. Supervisors, etc.*, 14 Wis., 618 and 623; *Chicago, etc. v. Frary*, 22 Ills., 34.) The taxes being made by statute a perpetual lien and the plaintiffs taking title by quit claim, they took subject to the lien and are in equity as well as law bound to pay such taxes, and cannot come into a court of equity and obtain relief from the payment of a just debt due the public by pleading the laches of some officer in not enforcing its collection in a particular manner. (2 Neb., 424.)

BENNETT, J.—The determination of this appeal involves the question as to what extent and in what cases the powers of a court of equity may be invoked to restrain the collection of taxes. As it is here presented for the first time in this Territory, we have examined it with much care.

Before proceeding to notice the main point in issue, we observe, that, even admitting the soundness of the propositions laid down and contended for by appellants, they furnish no grounds for the relief asked in this case, as plaintiffs have, by their own showing, no standing in a court of equity.

They first insist that the relief prayed should be granted, for the reason that no assessment rolls were returned to the county clerk as provided for by section 24, chapter 25, laws of 1868-9. If true does it in any manner appear that they were injured or damaged by such official neglect? Admitting it to be true, that the filing of the assessment rolls with the county clerk was necessary to enable the tax payer to appear before the equalization board, appellants do not claim that they or their grantors were deprived of a substantial right

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which they then desired to exercise, or which subsequent events have shown should have been exercised. There is no pretense that this property was not subject to taxation, or that the valuation or assessment was too high, or that the tax was levied for an illegal purpose. What complaint could then have been made to the board of equalization, or what relief asked? The object of taxation is the raising of a revenue for governmental purposes; if the same end is accomplished, even though the proceedings may be irregular, that would have been reached had all the forms of the law been strictly complied with, equity, regarding the substance rather than the form, the end rather than the means, cannot be invoked to undo, or restrain from the doing of that which it was the object and purpose of the law to accomplish, and relieve a party, on a mere technicality, from the discharge of a legal obligation due the public, which he cannot even allege in his complaint to be unjust or burdensome.

But again, how can appellants avail themselves of the second ground on which relief is asked, viz.: that the personal property of their grantors should first be exhausted before the real estate can be sold. Section 59 of chapter 24, laws of 1868-9, provides: "No real estate *belonging to any person* shall be sold for taxes, while personal property belonging to *such person* can be found by the treasurer or collector, and no taxable property shall be exempt from levy and sale for taxes." The appellant Frost became the owner of the real estate advertised for sale, and which sale they seek to enjoin, in August, 1872. It seems clear to us that the right to have personal property exhausted before real estate can be sold, is a personal right, of the violation of which, the tax payer alone can complain, and of which no third party can be allowed to take advantage.

But again the language of the statute is plain and unmistakable: "no real estate belonging to *any person* shall be sold for taxes, while personal property belonging to *such person*, can be found, etc." This real estate *belongs* to appellants; do they complain that *they* have personal property that should first be exhausted? No; but that their grantors have, and they

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undertake by this extraordinary proceeding to remove the lien. Appellants do not disclose the character of the conveyance to Frost. It may have been made by an order of court, on adjudging Frost to be the equitable owner of the land, in that event how can he claim that he should not pay the taxes? It may be a quit claim; if so, he took thereby only the interest of his grantors, subject to the lien for taxes, and is bound to pay them. If it was a deed with full covenants of warranty, then certainly he has a complete remedy at law, and is in no position to ask any relief in a court of equity. But these considerations aside, should the relief asked be granted in any case on the grounds stated?

The levy and collection of taxes are legal proceedings under the statute, for the purpose of apportioning and enforcing a recognized obligation due the public, and can no more be interfered with or regulated by courts of equity, than can proceedings at law upon private claims. (*Warden v. Supervisors, etc.*, 14 Wis., 618.) Revenue laws, from the very magnitude of the subject, and the diversified interests involved, are somewhat complex, and for the purpose of carrying out their various provisions call in the services of different officials. These officers, from the nature of things, are not always experienced, or men of good business qualifications; the result is, that we frequently find departures from the strict letter of the statute, and irregularities in their proceedings. Should courts of equity undertake to interfere in all such cases, they would find their calendars crowded, collectors would constantly be embarrassed by injunctions, the collection of the revenue would be retarded and in many instances defeated, while the public would be burdened with the costs and expenses of litigation, and the resources of the government necessary for its maintainance in all its departments, rendered inadequate.

It has been well said that courts of equity do not sit to reverse or correct errors and mistakes of law, and cannot attempt to prevent, any more than it will redress, all wrongs.

It is no answer to say, let those whose duty it is to administer the revenue law do it with greater care, and do every

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thing which the law requires, just as it requires, and at the time specified, and be careful that they do no more than is required. We must take things as they are, and look at practical results. (*Chicago, etc. v. Frary*, 22 Ills., 34.)

The doctrine seems well settled, that equity will not interfere by injunction to restrain the enforcement of tax proceedings on the ground of irregularities or errors in the assessment of the tax, or in the execution of the power conferred upon taxing officers, the remedy at law being deemed sufficient in such cases. (High on Inj., § 355; *Maciot v. Davenport*, 17 Iowa, 379; *Warden v. Supervisors, etc.*, supra.)

The cases in which courts of equity have exercised jurisdiction in matters of this character, will be found to be confined almost exclusively to those wherein the tax itself is illegal or unauthorized—not a legal tax assessed in an irregular manner—(*McClure v. Owen*, 21 Iowa, 133;) or where the property assessed is not subject to the tax; (*I. C. R. R. Co. v. County of McLean*, 17 Ills., 291;) or where fraud has been practiced by the taxing officers. (*Cleghorn v. Postlewaite*, 43 Ills., 428.)

The reason for the rule reaches back of the official acts of taxing officers. The obligation to contribute to the support of government, rests upon all citizens regardless of the duties imposed on assessors and collectors. The debt due the public is not *created* by the assessment of taxes, and the proceedings necessary for their collection, but is only thereby apportioned and enforced. Hence irregularities and defects in the proceedings do not extend to or effect the original obligation inherent in and growing out of the political compact. And we might formulate the doctrine in these words: that before an injunction will issue to restrain the collection of a tax, it must clearly appear that the tax is not such an indebtedness, as the duty of the citizen, defined and regulated by law, requires him to discharge. A party will certainly not be permitted to come into a court of equity, and say the debt is justly due, and I am morally and legally bound to pay it, but the proceedings instituted for its enforcement are irregular. He that seeks equity must first do equity.

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It is laid down as a broad principle, that in no case will the collection of a tax be enjoined where it is not shown that the injury resulting from its enforcement would be irreparable, and this fact must appear in the bill by issuable averments. (High on Inj., § 362; *Ritter v. Patch*, 12 Cal., 298.) If the tax is, in itself a legal one, and the property on which it is levied subject to taxation, then it cannot be said that any such injury could result from its collection. It might financially embarrass the tax payer, it might cast a cloud on his title, it might absolutely bankrupt him, but would these be any reasons for the interference of a court of equity? Assuredly not, or the powers and process of such court would find ample employment.

The grounds on which relief is asked in this case, are beyond all question, merely technical, relate to irregularities in the manner of assessing, and the mode of collecting the tax; and while we do not undertake to say here what effect might be given to them in a court of law, where a title acquired under a tax sale might be involved, we are clearly of opinion that they are wholly insufficient to authorize the interference of a court of equity.

Admitting, as the demurrer does, the allegation to be true, that the assessment rolls were not filed with the county clerk as required by statute, does it by any means necessarily follow that the tax was levied for an illegal purpose, or that the property was not subject to taxation? Certainly not. If such were the facts in the case, the relief would be granted on proper showing, whether the assessment rolls were so filed or not. If not illegal, and the property was justly chargeable, of what have appellants to complain? The objection is a bald one, especially when unaccompanied by any averment of damages arising from the omission, and is trifling and captious in the extreme—one which no chancellor should be asked or expected to notice.

The second point is one on which some courts have divided. But keeping in view the governing principles which we have laid down, it is one of easy solution. It will be borne in mind that the objection is not to the character or amount of

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the tax, but simply as to what kind of property shall be sold for its satisfaction. We cannot be called upon, in a proceeding of this character, to determine the question between appellants and a third party, as to who should pay the tax—it is made by statute a perpetual lien upon the real estate, and that lien cannot be effected by any agreement between appellants, and their grantors, as against the public. It is a matter of indifference to the public interests, who pays the tax or out of what kind of property it is made. But it is of the highest importance that it be paid, and that speedily, and with as little cost and expense to the public treasury as possible. A party occupies no very equitable ground to say the least, who admits that land which he owns is chargeable with a tax, that such tax is just and legal, but that he will make the error or neglect of an officer his excuse for delaying or defeating its payment.

The last article of personal property subject to taxation belonging to the poor man, may be seized and sold for the satisfaction of the tax, and courts of equity in most cases could afford no relief, while the rich man, with his broad acres, and money to fee attorneys, if permitted to take advantage of such quibbles and technicalities, might indefinitely postpone the discharge of his obligation, thereby throwing additional burdens on willing tax payers, and embarrassing the public treasury.

The tax in this case is due—it is just—it is legal, and common justice demands it should be paid. With the manner of its collection, we have nothing to do. (*Hallenbeck v. Hahan*, 2 Neb., 377.)

If the officer has acted illegally, contrary to the provisions of the statute, to the damage of appellants, they must seek redress in the courts of law—there they have an adequate remedy.

In the case of *MacIot v. City of Davenport*, supra, Judge Cole in delivering the opinion of the court, uses the following language:

“It is a well recognized fact, that more or less error has always been connected with the assessment, levy, and collection

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of taxes. This fact finds abundant verification in the almost universal failure and insufficiency of the tax titles. This insufficiency has resulted from the errors and irregularities in the assessment, levy and collection of taxes; and if a tax payer may enjoin the collection of the taxes for an error in the assessment, he may enjoin for any other error; the result would be a flood of injunctions all over the land, and the collection of the revenue would be stayed, to the bankruptcy of every government, city, county, or state. \* \* To hold that such a course could be pursued would be to hold that the government had provided for its own strangulation at the hands of one of its departments."

We are, therefore, of opinion that the demurrer was properly sustained, and the judgement of the court below is

AFFIRMED.

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DECEMBER TERM, 1875.

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PRESENT:

HON. PETER C. SHANNON, CHIEF JUSTICE.

HON. ALANSON H. BARNES,	} ASSOCIATE JUSTICES.
HON. GRANVILLE G. BENNETT,	

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EX PARTE JAMES SCOTT.

1. *HABEAS CORPUS*: JURISDICTION: RES ADJUDICATA. Under the habeas corpus act, district courts have original, concurrent jurisdiction with the supreme court, and their judgments are subject to review as in other cases.
2. ———: ———: ———. After the writ has once been sued out before the supreme or district court, or a judge thereof, and an adjudication had thereon, the principle of *res adjudicata* is applicable, and until that judgment is reversed, the facts and conditions remaining the same, a writ subsequently issued must be abated.



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Ex Parte James Scott.

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*Petition for writ in Supreme Court.*

THE facts are fully stated in the opinion.

*Shannon & Washabaugh*, for relator.

*Wm. Pound*, U. S. Atty., for the government.

SHANNON, C. J.—At this term the above named party applied for and obtained a writ of habeas corpus, directed to J. H. Burdick, U. S. marshal, to inquire into the cause of his imprisonment in the U. S. jail, etc. Upon the return of the writ and it appearing that the relator was held by the marshal by virtue of a warrant of commitment, issued by L. Congleton, a U. S. Commissioner, dated July 8, 1875 (on a charge of giving, bartering and selling spirituous liquors to an Indian, in Yankton, Yankton County, D. T., said Indian belonging to the Yankton Indian reservation, and being under the charge of an Indian agent) the U. S. district attorney suggested to the court that heretofore, to-wit: on the 10th of July, 1875, in the district court in and for the second judicial district, upon petition of this same party, and upon similar allegations, and in relation to the same charge and subject matter under the same facts and conditions—that court had granted a writ of habeas corpus directed to the same officer, upon which the same return as now was made; and that thereupon, in said court, after a due hearing and consideration, a final decision or judgment was duly rendered.

He therefore asked that this present writ (so issued by the supreme court) should be abated, because the case was *res adjudicata*.

The facts thus suggested by the district attorney having been fully admitted by the counsel of the relator, and that the same matter, under the identical complaint as aforesaid, was not only determined and adjudged by the district court, but it was directly and solely in question and in controversy, under the said first writ of habeas corpus—it was insisted by the relator's counsel, that notwithstanding the proceedings and

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decision under the former writ, he had a right to a hearing and determination upon the present one.

After careful consideration, we have arrived at the conclusion that this writ should be abated. Under our laws, the principle of *res adjudicata* is applicable to a proceeding upon habeas corpus. In such cases the district court has original, concurrent jurisdiction with this court; and where a court has jurisdiction, it has a right to decide every question which arises in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is binding in every other court.

In the application of the principle of *res adjudicata*, it ought to make no difference whether the first writ was returnable before a court of record or a judge out of court; for in neither case ought the party suing out the writ be permitted to proceed *ad infinitum* before the same court or officer, or before another court or officer having concurrent jurisdiction, to review the former decision, while the facts and conditions remain the same.

If the relator is dissatisfied with the decision of the court below, he cannot properly ask us to review it in this mode. Our appellate jurisdiction can only be invoked and exercised in the manner prescribed by law. The writ is

QUASHED.

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UNITED STATES EX REL. JAMES SCOTT V. J. H. BURDICK, U. S. MARSHAL.

1. *HABEAS CORPUS*: WRIT WHEN GRANTED: JURISDICTION. The Supreme and District Courts of this Territory possess common law as well as chancery jurisdiction; and the said courts and the respective Judges thereof may grant writs of habeas corpus in all cases, and in similar manner, in which they are granted by the Federal courts and Judges.

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2. ———: ———: ———. The writ may be granted as well in cases where the petitioner is restrained of his liberty for an alleged crime against a law confined in its operation to the Territory—whether enacted by Congress or the Territorial Legislature—as against an act of Congress applicable to the whole of the United States.
3. ———: ADJUDICATION: APPEAL. From an adjudication by the District Court or a Judge thereof on petition for writ of habeas corpus, an appeal lies to the Supreme Court of the Territory.
4. INTOXICATING LIQUORS: SALE TO INDIANS: JURISDICTION. The sale of intoxicating liquors to an Indian in charge of an Indian Agent, except by an Indian in the Indian country, is an offense against the laws of the United States, for the trial and punishment of which the Federal courts alone have jurisdiction.
5. ———: ———: LOCUS IN QUO. The offense is the same, and the jurisdiction is unchanged, whether the liquor is sold to such Indian in the Indian country, on a reservation, or in some place within the exclusive jurisdiction of the United States, or without the boundaries of either.

*Appeal from Yankton County District Court.*

THE relator was arrested on information charging him with the offense of selling, giving away and disposing of spirituous liquor to an Indian, in charge of an Indian Agent, at the City of Yankton, D. T.; confessedly not in the Indian country, nor on an Indian reservation, said Indian being temporarily absent from his agency. After a preliminary examination before a commissioner, the defendant was committed to await the action of the United States grand jury. He then presented his petition to the court below, praying for a writ of habeas corpus, which was granted, and on the hearing that court refused to discharge the prisoner, and ordered him remanded to the custody of the U. S. marshal until he should execute the required recognizance.

From this judgment, the relator appeals.

*Shannon & Washabaugh*, for relator.

*Wm. Pound*, U. S. Att'y, for respondent.

SHANNON, C. J.—On the tenth day of July, 1875, James Scott presented his petition to the above named court in term-time, praying for a writ of habeas corpus, to be directed to the

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U. S. marshal, J. H. Burdick. On the same day the writ was granted, and a hearing took place on the following return of the marshal, to-wit:

I hold the person named within in my custody, by virtue of a warrant of commitment made and issued to me by L. Congleton, a U. S. commissioner in and for the Second Judicial District of the Territory of Dakota, dated July 8th, A. D. 1875, a certified copy of said warrant of commitment being herewith attached, marked: 'Exhibit 'A.' He is held by me as C. Higgins, *alias* James Scott, and I have his body here in court, as I am within commanded. Signed, J. H. BURDICK,  
Yankton, July 10, 1875. U. S. Marshal.

On the same day that court rendered a decision as follows: "Upon the return, as above, of this writ, and after hearing and argument of counsel, and in consideration thereof, it is ordered and adjudged that the said C. Higgins, *alias* James Scott be, and he is, remanded into the custody of the U. S. marshal, until he shall enter into proper recognizance in the sum of \$200.00, with at least two good sureties, according to law, for his appearance at the October term, 1875, or until he shall be otherwise discharged according to law."

From the record and facts brought up by this appeal, it further appears that the relator (a white man) was held by the defendant by virtue of said warrant of commitment, on the charge of giving, bartering and selling spirituous liquors to an Indian, in Yankton, Yankton County, Dakota Territory, (within the jurisdiction of the court below) the said Indian belonging to the Yankton Indian reservation, and being under the jurisdiction (or charge) of an Indian agent. The complaint was under section 2139 of the revised statutes of the United States, and the City of Yankton, in Yankton County, the *locus in quo*, is not within the Indian country, nor within any reservation.

In the court below, as well as in this court, the relator contended that "he is not committed or detained by virtue of "any process issued by any court of the United States, or any "judge thereof, in a case where such courts or judges have "jurisdiction under the laws of the United States, or have acquired such jurisdiction by the commencement of any suit in "such court; or by virtue of any final judgment or decree of "any competent tribunal of civil or criminal jurisdiction, or

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“by virtue of any execution issued upon such judgment or “decree”; and furthermore that “his said imprisonment is illegal, and the said illegality consists in this, to-wit: That “by section 2139 (Revised Stats. of U. S.) the United States “have no jurisdiction to arrest, confine, detain or try him for “the offense mentioned in the complaint, (and in the commitment) of selling, giving and disposing of spirituous liquors “to an Indian, at the City of Yankton, D. T., because if said “offense was committed at Yankton (the city) it is not in the “Indian country, and therefore the United States have no jurisdiction of the said offense.”

On the argument in this court, two questions have been presented: first, is this an appealable case? Secondly, if the relator did give, barter or sell spirituous liquor to an Indian, under the charge of an Indian agent, but such act occurred *not in the Indian country*, but outside thereof, is it a criminal offense under the said section 2139 of the revised statutes of the United States.

As to the first point, the Supreme Court and the District Courts of this Territory possess common law as well as chancery jurisdiction (Sec. 1868, Rev. Stats. of U. S.) and the said courts, and the respective Judges thereof, may grant writs of habeas corpus in all cases in which the same are grantable by the Judges of the United States in the District of Columbia. (Sec. 1912.)

In what cases are such writs grantable by the last named Judges? (See Act of Congress of 27 February, 1801, § 3, 2 stat. 105; Act of 29 April, 1802, § 24, 2 stat., 166; Act of 3 March, 1863, 12 stat., 762; *Kendall v. U. S.*, 12 Pet., 624; *Decatur v. Paulding*, 14 Pet., 601; *U. S. v. Williams*, 4 Cr. C. C., 376.

From this examination it seems that the Judges in that district were, and are authorized to grant writs of habeas corpus in all cases (and in a similar manner) in which they were grantable by the federal courts and Judges, as pointed out in title XIII, chap. 13, Rev. Stat. of U. S., entitled “Habeas Corpus.” And, moreover, that they were and are empowered to grant them, as well in cases where the petitioner was or is restrained of his liberty for an alleged crime against

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a law confined in its operation to the District of Columbia, as against an act of Congress applicable to the whole of the United States, criminal cases in this Territory are of two classes—first, those that arise under the local or territorial laws; secondly, those that arise under the general criminal laws of the United States.

It follows, therefore, that the meaning of section 1912 is: that the Supreme Court and the District Courts of Dakota, in term-time, and any one of their Judges in vacation, may grant writs of habeas corpus in all cases of both the above classes, to-wit: whether the prisoner is in custody, under, or by color of the authority of the United States, and is committed for trial before some court thereof; or whether he is restrained of his liberty under or by color of a law enacted by the Legislative Assembly of the Territory, and is held for trial before some court of a county.

But again, the present case is one arising under a general law of the United States; and by section 1910 (Rev. Stat.) the court below has and exercises the same jurisdiction in such a case, as is vested in the Circuit and District Courts of the United States. Consequently, whatever jurisdiction a court of the latter kind has, in any state, in cases arising under the federal laws, the same has been conferred upon our District Courts. And with the grant of jurisdiction, go all the principles and rules of procedure, appertaining or necessary to it.

In other words, in all cases arising under the constitution and laws of the United States, each of our three District Courts is, as to jurisdiction and procedure, exactly like a Federal District Court sitting in a state, with this difference, however: that to the above jurisdiction of our District Courts is super-added in such cases the jurisdiction of the Circuit Courts of the United States.

And as to such cases, when arising under habeas corpus, see sections 751, 752 and 753 of the Revised Statutes. The following sections, to-wit: (754 to 761, inclusive) regulate the procedure upon all such writs; and in so far as these sections do not regulate the *procedure*, Mr. Abbott, (Vol. 2, U. S. Practice, 211) on authority cited, considers that it is governed

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by the common law of England, as it existed at the time of the adoption of the constitution. (*Ex Parte Kaine*, 8 Blatch., C. C., 1; *Ex Parte Aernam*, *ibid*, 160. It is observable that by section 1912, the Supreme Court and the District Courts have concurrent original jurisdiction. The general principle as to the comity of tribunals of concurrent jurisdiction, is, that between such courts, the court that first takes possession of the controversy must be allowed to dispose of it finally, without interference or interruption from the co-ordinate Court. The comity shown by courts to the proceedings of each other in the application of this rule has, indeed, a foundation of necessity in the nature of judicial power. The power to determine controversies does not admit of adverse determinations of the same controversy by co-ordinate tribunals. The authority of a court to dispose of a given case pending before it, must necessarily exclude the authority of any other court to determine the same controversy under the same conditions, except in the way of a regular and orderly revisal, after determination has been had. This rule is essential to the administration of justice in all countries where there is more than one court having the jurisdiction of the same matter. Take for instance those cases in which the courts of the several states are to be regarded as co-ordinate with those of the general government. It has been laid down as a general rule of action for them that whichever shall first take jurisdiction of a case, the jurisdiction of the other may thereafter be defeated by a plea in abatement. (*Earle v. Raymond*, 4 McLean, 233.)

Where a court of co-ordinate jurisdiction, therefore, first becomes in possession of a case, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversal, is binding in every other court. (*Decatur v. Paulding*, 14 Pet., 600; 1 Pet., 340; 3 Pet., 203; *Ex Parte v. Watkins*; *Peck v. Jenness*, 7 How., 625; 20 How., 596; 19 Wall., 223.)

Although not of much importance now, yet it is curious to observe the tendency of courts in this country to attach to a decision in habeas corpus the legal incidents belonging to

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*rem adjudicatam.* See in New York as to this point, 25 Wend., 64; 6 Johns., 337; 3 Hill, 400-415; *ibid*, 675, note, page 51; 1 Parker's Cr. R., 129; 3 Parker's Cr. R. 531.

In 1840, in the Supreme Court of the United States, the question whether a writ of error would lie to a decision on a habeas corpus, was discussed in the case of *Holmes v. Jennison*, 14 Peters, 540. Several Judges expressed their opinions upon this point, and from these it may be collected that five of the Judges concurred in the view that the writ would lie in such a case. Justices Thompson and Barbour expressed no opinion on the point; and Baldwin, J., alone held that the writ would not lie to a decision on habeas corpus. But shortly thereafter, on the 29th of August, 1842, (5 Stat., 589, § 763 Rev. Stat.; Brightly's Dig. of Laws, vol. 1, 302) Congress enacted that from the final decision of any court, justice or judge, inferior to the Circuit Court, upon an application for a writ of habeas corpus, or upon such writ when issued, an appeal may be taken to the Circuit Court, etc., that act, however, only providing an appeal in a specific case. (See, also, the Act of Congress of 5th Feb., 1867, § 763 of Rev. Statutes; 14 Stat., 385; in Brightly's Dig., vol. 2, 213.)

Next in the order of time, came the decision, upon the Statute of 5 February, 1867, to be found in *Ex-parte McCardle* (at Decr. T., 1867) 6 Wall., 318.

Then followed Act of 27 March, 1868, § 1, 15 stat., 44, in 2 Brightly's Dig., 214, repealing the right of appeal to the Supreme Court of U. S.; and then again came *Ex-parte McCardle*, in 7 Wall., 506. \* \* \* \* Happily, we are not left in doubt as to whether an appeal will lie in the case before us; for by section 1869 of Revised Statute, writs of error, bills of exception, and appeals shall be allowed, in all cases, from the final decisions of the District Courts to the Supreme Court, under such regulation as may be prescribed by law; and by section 1910, writs of error and appeals in all cases, or causes, arising under the constitution and laws of the United States, may be had to the Supreme Court of the Territory, as in other cases. (See 14 Peters, 540.)



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Section 1909, prescribes, moreover, that upon writs of habeas corpus involving the question of personal freedom, a writ of error, or appeal, shall be allowed to the Supreme Court of the United States, from the decision of the Supreme Court of the Territory, or of any Judge thereof, or of the District Courts, or of any Judge thereof.

We come now to the consideration of the second question presented, to-wit: if the relator did give, barter, or sell spirituous liquor to an Indian, under the charge of an Indian Agent, but such act occurred *not in the Indian country*, but outside thereof, is it a criminal offense under section 2139 of the Revised Statutes of the United States?

After a careful examination into the sources from which this section was drawn, to-wit: the original acts of Congress of 9 July, 1832, and 15 March, 1864, and the case of *United States v. Halliday*, in 3 Wallace, 407, as well as from the words of the revised law, we have come to the unanimous conclusion that the exception in the second clause or sentence of this section, to-wit: "*except an Indian*," does not end with the punctuation immediately after the above word "Indian," but that the exception clearly extends to and embraces "*an Indian in the Indian country*"—as if it stood thus: except an Indian in the Indian country.

The true construction, therefore, of this law, is, that "every person who sells, exchanges, gives, barter, or disposes of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or agent \* \* \* shall be punishable by imprisonment for not more than two years, and by a fine of not more than three hundred dollars;" and that the only persons exempted from this punishment are Indians themselves, who, in the Indian country, thus sell, give, or dispose of such liquor or wine to any Indian under the charge of any Indian superintendent or agent.

As to the policy or wisdom of this exception, we, of course, have nothing to say; that is beyond our province. But it is proper to observe, in this connection, that this special impunity extended to Indians in the Indian country, seems well to harmonize with the spirit and policy of all the enactments of

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Congress relating to intercourse with the Indian tribes. By the Acts of 30 June, 1834, and 27 March, 1854, as revised and embodied in section 2145, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country. And by section 2146, as amended by the Act of 18 February, 1875, entitled "An act to correct errors and to supply omissions in the Revised Statutes of the United States," it is declared that the preceding section (2145) shall not be construed to extend to crimes committed *by one Indian against the person or property of another Indian*, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction over such offenses is or may be secured to the Indian tribes respectively."

Whence it appears that, although an Indian in the Indian country, may commit larceny of the property of another Indian, or may there assault him with intent to kill, or may there even murder him, yet our courts are powerless to punish, because they have no jurisdiction. In accordance, therefore, with such well-settled legislation as to crimes of such magnitude, it might well seem absurd to the law giver to depart from the clear line of policy thus laid down, and to render an Indian in the Indian country punishable for the minor offense described in section 2139.

However this may be, we find that when an Indian in the Indian country, sells, gives, or disposes of any spirituous liquors or wine to another Indian there, who is under the charge of an Indian Agent, he is as exempt from punishment in our courts, as he would be in regard to the other crimes enumerated.

It does not, therefore, avail the appellant to assert that the offense as charged was committed at the City of Yankton, and outside of the Indian country. It is a criminal offense

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under said section 2139; and the marshal properly held the accused under the warrant of commitment issued by the U. S. commissioner.

We can find no error in the proceedings or decision of the court below; and the same are hereby

**AFFIRMED.**

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**SANDERS ET AL V. REISTER.**

1. **HUSBAND AND WIFE: CO-PLAINTIFF: COMPETENT WITNESSES.** Under the provisions of the Code of Civil Procedure, husband and wife, when joined as co-plaintiffs or co-defendants, are competent witnesses to testify in their own behalf, and the fact that the evidence of one may incidentally benefit the other, is no valid objection.
2. ———: ———: ———. The rule that permits husband and wife, when joined, to testify in their own behalf, cannot be extended to authorize or permit one to testify against the other, excepted in cases provided by statute.
3. **EVIDENCE: EXPRESSIONS OF PAIN: INJURY.** Wherever the bodily or mental feelings of an individual, are material to be proved, in case of injury, the usual expressions of such feelings, pain and suffering, are original and competent evidence.
4. ———: ———: ———. The common complaints of pain and distress, as the natural concomitants of illness and physical injury, are regarded as verbal acts, and proof of them is as competent as any other testimony when relevant to the issue.
5. **TRESPASS: NEGLIGENCE: DAMAGES.** The mere fact that the plaintiff, when she suffered the injury, was technically trespassing on the defendant's land, does not deprive her of all remedy for defendant's negligence, if her trespass did not involve negligence on her own part contributing to her injury.
6. **HIGHWAY: EXCAVATIONS: PROTECTION.** A person opening near a public way a deep and dangerous excavation, is bound to place some guard or protection around it, if it is sufficiently near such public way to make it probable that persons traveling thereon might be injured. And whether the excavation is deep and dangerous, and in dangerous proximity to the public way, are questions for the jury.
7. ———: ———: ———. The obstructions or nuisances need not be directly in the road—it is enough if they are so close to it as to make traveling thereon dangerous; and the true and proper test of legal liability is whether the excavation be substantially adjoining the way.

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8. **NEGLIGENCE: CONTRIBUTORY: ONUS PROBANDI.** Negligence on part of plaintiff is a mere matter of defense to be established affirmatively by the defendant, by a preponderance of the evidence, though it may be inferred from the circumstances proved by the plaintiff.
9. ———: ———: ———. The plaintiff may establish the negligence of the defendant, his own injury in consequence thereof, and his case is made out; if there are circumstances that convict him of concurring negligence, the defendant must prove them and thus defeat the action.

*Appeal from Yankton County District Court.*

This action was brought for the recovery of damages sustained by reason of injuries resulting to plaintiff, Anna Saunders, from a fall into a cellar, alleged to have been dug by defendant, and left unguarded on his lot in the City of Yankton, and in dangerous proximity to the street and alley on which said lot is situated, which sickness resulted in sickness and a miscarriage.

Defendant in his answer, admits the ownership and occupancy of the lot, and the marital relation of plaintiffs. All other material allegations are denied. It is further alleged in the answer that if plaintiff, Anna Sanders, was injured in any way by falling into a cellar on defendant's lot, it was while she was off the public streets and alleys of the city, and upon the property of defendant, and while she herself was guilty of carelessness and negligence, and that defendant had dug no cellar except such as he lawfully might upon his own premises, and with sufficient notice to plaintiff and the public, and with sufficient guard and protection.

During the progress of the trial, plaintiffs called as a witness, plaintiff Anna Sanders, the wife of her co-plaintiff, and offered to prove by her the facts and circumstances connected with her falling in the cellar, and her injuries occasioned thereby. Defendant objected to the said Anna Sanders being examined: 1st, in this case at all; 2d, in behalf of her husband, co-plaintiff; and 3d, especially as to any facts not within her exclusive knowledge as agent or otherwise, as being incompetent under the statute, and upon the issues herein, which objections were, by the court, overruled. Defendant excepted and the witness was examined.

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Plaintiffs also called as witness, Mrs. Roth, a midwife, Katie Klickner, a house-servant of plaintiffs', and Dr. J. B. Vanselsor, a practicing physician, and proposed to prove by them, among other things, the statements made to them by Anna Sanders on the morning after the alleged injury, and on several successive days subsequent thereto, in regard to the state of her health and injuries. To the introduction of this evidence defendant objected, as calling for hearsay testimony, and for the declarations of the plaintiff in the absence of the defendant. The objection was overruled, defendant excepted, and the evidence was admitted.

When plaintiffs had rested, defendant moved the court to non-suit the plaintiffs, and dismiss the action for the following reasons:

1. Defendant has done no act of commission. If anything, it was an act of omission.

2. Defendant did nothing more than he had a lawful right to do, in digging the cellar, and leaving it unguarded.

3. There is no evidence to show that defendant dug the cellar, or caused it to be done.

4. The plaintiff, Anna Sanders, was herself guilty of negligence.

Which motion was overruled by the Court, and defendant excepted.

After defendant had introduced all his testimony, and had rested, plaintiffs produced as a witness, the plaintiff, Charles A. Sanders, for the purpose of rebutting statements made by a witness for the defendant, relating to said witness being a witness in this case. Defendant objected to the introduction of said plaintiff, on the ground that he was the husband of his co-plaintiff, Anna Sanders, was therefore not a competent witness, and because said Anna Sanders had been sworn and testified in the case in chief. Which objection the Court overruled, and allowed said Charles A. Sanders to testify. Defendant excepted, and said witness testified as follows:

"He (Dunlap) said if I did not settle the case I had against him, he would be the biggest witness I would have against me in this case."

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Plaintiff Anna Sanders was then recalled by plaintiffs, and defendant objected to her testifying, on the same ground as when she was called in chief, and for the further reason that her husband had been called, and had testified in behalf of plaintiffs. These objections the Court overruled, and allowed her to testify, and defendant excepted.

After the evidence had closed, and both parties had rested, defendant again moved that a non-suit be entered against the plaintiffs, on all the evidence, which motion the Court overruled.

Defendant asked the Court to give to the jury the following instructions, which were refused:

1. If the jury believe from the evidence that the defendant dug the cellar in question on his own lot, and far enough from the line of the street and alley so that in passing along said street or alley, said plaintiff, Anna Sanders, could not have fallen into said cellar, and the jury further believe from the evidence that if said plaintiff fell into the cellar it was while she was upon the lot of defendant, and was there without any permission or invitation of said defendant, and not in pursuit of any lawful business, so as to give her a right to be there, the plaintiffs cannot recover in this action, unless the jury further find that said cellar was intentionally left unguarded, or the defendant was guilty of gross negligence.
2. If the jury believe from the evidence that the street and alley bordering upon defendant's lot, where this cellar was dug, were entirely clear and unobstructed, and the plaintiff, upon the evening in question, while going from her house to the house of Mrs. Roth, left said street, and either voluntarily or accidentally went upon the lot of defendant without his knowledge or consent, and not in the pursuit of any lawful business, and while on said lot, fell into the said cellar, the plaintiffs cannot recover in this action, unless the jury shall believe from the evidence that said cellar was purposely left unguarded, or the defendant was guilty of gross negligence in not properly guarding said cellar.
3. If the jury believe from the evidence that the plaintiff, Anna Sanders, fell into the cellar thereon, while she was upon

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the lot of defendant, described in the complaint, and the jury believe from the evidence that she was at the time upon such lot without defendant's permission, or without the permission of some person authorized to grant it, and that she could have pursued her journey without the necessity of going upon said lot, and the jury further believe from the evidence that defendant had no intention of injuring the plaintiff, or any other person, by leaving the cellar unguarded, and was not by so doing guilty of gross negligence, then plaintiff cannot recover and the jury should find a verdict for defendant.

4. The jury are instructed that to entitle the plaintiffs to recover in this action, the jury must find that the defendant, in leaving the cellar unguarded, did not exercise ordinary care or skill: that is to say, that he did not in so doing, do what men of ordinary prudence would do under like circumstances. Therefore, if the jury believe from the evidence that the defendant, Michael Reister, did only what men of ordinary prudence and discretion generally do under like circumstances, and did not neglect to do anything in relation to guarding the cellar which men of ordinary prudence and care would have done under the same circumstances, then the verdict must be for the defendant.

5. The burden of proof is upon the plaintiff to show the negligence of the defendant, and if the jury shall believe that the evidence adduced before them evenly balances upon the question of negligence of the defendant, and does not preponderate in favor of the plaintiffs, then the verdict should be for the defendant.

6. The plaintiff cannot recover in this action if the jury believe from the evidence that the plaintiff, Anna Sanders, by the want of ordinary care, incurred the risk of the injury of which she complains.

7. If the jury believe that the plaintiff, Anna Sanders, in going from her house to Mrs. Roth's in the night time, and under circumstances to which she has testified, did not exercise ordinary care, and thereby incurred the risk of the injury which she complains to have suffered, then these plaintiffs cannot recover, and your verdict should be for the defendant.

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The Court (BENNETT, J., presiding) delivered to the jury the following instructions, to all of which, with the exception of the 5th, defendant excepted:

"3. Defendant having been, as admitted by the answer, the owner and occupant of the lot at the time of the injuries complained of, the law presumes that whatever hole or cellar may have been dug on the lot, was so dug by him, or by his direction, or remained there with his knowledge or consent.

4. It is incumbent on the plaintiff to prove, 1st, the existence of the hole or cellar on said lot; 2d, that it was deep and dangerous; 3d, that it was so near a public street or alley as to be dangerous under ordinary circumstances to persons passing upon the street or alley, and using ordinary care to keep upon the proper path; 4th, that defendant took no reasonable precautions to prevent injuries happening therefrom to such persons passing by; 5th, that the plaintiff, Anna Sanders, in passing along the street or alley, using ordinary care, fell into such hole or cellar and was injured.

5. The negligence of the defendant being the gist of the action, the burden of proof rests with plaintiffs to establish it; and if they fail on this point, they cannot recover, it matters not how seriously the plaintiff, Anna, may have been injured; the fact of the injury raises no presumption of negligence on the part of defendant, but such negligence must be proven.

6. Negligence is more nearly synonymous with carelessness, than with any other word. It signifies primarily the want of care, attention, diligence, skill or discretion in the performance of an act by one having no positive intention to injure the person complaining thereof, and is a violation of the obligation which enjoins care and caution in what we do, and whatever may be its grade, there is no purpose to do a wrongful act, or to omit the performance of a duty. It is an absence of proper attention, care or skill, and is strictly non-feasance—not malfeasance. But, of course, the fact that the injury caused was unintentional, is no excuse.

7. But if you find that plaintiff was injured as alleged in the complaint, and that defendant was chargeable with some



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degree of negligence, before you can find for plaintiffs you must also find that the party injured, Anna Sanders, was entirely free from any negligence which contributed to the injury—that is of any negligence without which the injury would not have happened. And this negligence on the part of the person injured must be strictly confined to the immediate causes and circumstances of the injury complained of, and must not be remote or indirect. It may be said if plaintiff had not been on the street in a dark night she would not have been injured. But persons have the right to be upon the street and alleys of the city even at night and even though the night be dark and stormy, and courts will not stop to inquire into the necessity or business that required them to be there, or ordinarily, as to whether prudence might not have required them to remain at home; and persons so going upon the streets and alleys of a city have the right to expect that such streets and alleys are in a safe condition, so far as being free from dangerous excavations or obstructions in the immediate street or alley, or in dangerous proximity thereto.

8. The degree of care and prudence required to be exercised by plaintiff depends on the probabilities of danger or the risk incurred. Greater care and vigilance is required of a person in crossing a railroad track or in places of peril, than in a public street, where ordinarily the traveler has a right to expect a safe and unobstructed way, and the degree of care and diligence to which the plaintiff, Anna, must be held is that of ordinary care and diligence under the circumstances in which she was placed; and if you find that she did not exercise such care and diligence, then she was guilty of negligence. But the jury will bear in mind that this applies to the immediate causes and circumstances of the injury complained of, and to nothing else.

9. Negligence on the part of plaintiff is a mere matter of defense to be proved affirmatively by the defendant of which you must be satisfied by a preponderance of the evidence, though it may, of course, be inferred from the circumstances proved by the plaintiffs. The law will not presume contributory negligence on part of plaintiffs.

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10. If you find that the excavation on defendant's lot was deep and dangerous, and in dangerous proximity to the street or alley, it was then the imperative duty of the defendant to protect the traveling public or persons passing to and fro on the street or alley against danger, injury or accident therefrom, and this without reference to what others may do or might have done under similar circumstances, and without reference to the cost or trouble in providing such protection.

11. What would be held negligence in a thickly populated city, where many persons are passing and repassing by night and by day, might not be negligence in the country visited by few, strangers to the danger, and seldom after night fall; and in determining the question of negligence on part of defendant, you are to consider the probable danger of persons being injured by reason of the excavation not being protected, or the insufficiency of any protection that may have been placed around it.

12. Whether this excavation was in dangerous proximity to the street or alley, is a question for you to determine from the evidence, and all the circumstances. As has already been stated, persons have an undisputed right to be upon the street or alley and upon every part of them up to the very line, and where there is nothing to define the line they are not held to an accurate knowledge of it. And an excavation made near to a street or alley, though not dangerous to one keeping strictly in the street or alley, yet if so near that a person deviating a little therefrom, is in danger of falling in, it is in dangerous proximity. The location of the excavation and the probable danger of persons falling therein, either during the day or in the darkness of the night, are to be considered by you in determining this question.

13. You are also to determine from the evidence whether this excavation, if you find one existed on the lot of defendant, was deep and dangerous, and for this purpose you will consider the probability of injury from a fall therein, or whether a person would likely be injured from such a fall, and if you find that Anna Sanders was actually injured from falling in this excavation, it is evidence tending to prove its

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dangerous character. No particular depth is essential; persons are sometimes injured by an unexpected step downwards of even a short distance.

14. Defendant had an unquestioned right to dig a cellar on his own lot, and near to the street or alley, but if so near as to be dangerous, he has no right to leave it unprotected or unguarded. And it matters not how many there may be in the city in that condition, the negligence of others will not excuse him.

15. If you find from all the evidence that plaintiffs are entitled to recover, then nothing remains for you to do but assess the amount of recovery. And in assessing the damages you will take into consideration the pecuniary loss, if any proven, the bodily and mental pain and suffering of the plaintiff, Anna, both past and future, if you find from the evidence that it is reasonably certain that future pain and suffering are inevitable. But future damages should only be awarded in case the evidence renders it reasonably certain that such damages will inevitably and necessarily result from the original injury, and after a careful examination of all the evidence, award to plaintiffs such sum, not exceeding the amount claimed, as will be a just and reasonable compensation for the actual injuries sustained, or that may be sustained, as above explained."

Verdict for plaintiffs. Motion by defendant to set aside the verdict and for a new trial, overruled, and judgment on the verdict.

*Moody & Cramer*, for appellant.

Anna Sanders, the wife, was an incompetent witness to testify to any matter not within her exclusive knowledge as agent or otherwise.

Certainly it was error to allow both to testify. (Code of Civil Procedure, laws of 1867-8, chap. VII, page 103.)

If that chapter was not in existence, and we were governed by the common law, neither party could testify. That statute changes the common law, and adopts a general rule, allowing

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all to testify, and then puts a proviso thereto, applying to husbands and wives testifying for or against each other, which excepts that class of witnesses from this new rule, and leaves the common law in force as to them, unless the facts to be sworn to are in the exclusive knowledge of the one offered as a witness, as agent, or in some similar capacity, and then allows but one to testify. (5 Seld. N. Y., 153-160; 22 Ohio St., 527-532; 10 Ohio St., 429; Green'l Ev., §§ 334-342; *Pillon and wife v. Bushnell*, 4 How. Pr., 9; *Karney v. Paisely*, 13 Iowa, 89; 14 Iowa, 365; *Mann v. Marsh*, 21 How. Pr., 374; 13 Peters, 223.)

The plaintiff, Anna Sanders, having been allowed to testify, her declarations made out of court to her attendants, and especially to the domestic Kitty Klickner, were incompetent. There was no longer a necessity for this rule of evidence, and it being based wholly upon necessity—that being the reason of the rule—and the reason failing, the rule should cease. (45 N. Y., 574, *Reed v. Cent. R. R.*; 23 Wend., 50, *Robb v. Hickley*; § 1965, Civil Code.)

The complaint against the defendant in this case is not for any act of commission or affirmative misfeasance, but for an omission to perform what was claimed to be a *legal duty*, which he owed to the plaintiff, the failure to perform which resulted without her fault in her injury. It is certainly essential then, to a recovery, that the plaintiffs establish that the defendant owed at that time, some specific, clear legal duty to the party injured.

We are therefore to inquire: what were the relative legal rights of Anna Sanders to party injured, and the defendant, in respect to the *locus in quo*?

If she was upon the defendant's premises without authority of law, without his permission, invitation or license, and without necessity;—in other words, was there as a trespasser, as claimed by defendant—he owed her no legal duty to guard her against falling into a cellar which he was lawfully digging upon his own lands. And he had a right to have this view of the case, based, as it was, upon the evidence put before the jury, and we submit it was obvious error to refuse the instructions asked for by him. (*Nicholson v. Erie R. R.*, 41 N.

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Y., 526; *Hartfield v. Rooper*, 21 Wend., 615; Cent. Law Journal March 12, 1875; *Munger v. Tonawanda R. R.*, 5 Denio, 255, and 4 N. Y., 349; *Bush v. Brainard*, 1 Cow., 78; *Howland v. Vincent*, 10 Metc., (Mass.) 371; 15 American, 119.)

The charge of the learned Judge who presided at the trial, when taken as a whole, left the jury very little to do except to assess the damages. Its effect, we respectfully submit, was clearly this: The defendant, admitting in his answer that he was the owner and occupant of the lot upon which the hole or cellar was located, the jury are to presume as a matter of law, (which of course cannot be contradicted by any evidence) that the hole or cellar was dug by him and remained there with his knowledge and consent. That the plaintiff, Anna Sanders, had an undoubted right (and if so it therefore was not carelessness in her) to go wandering about in her then condition on that very dark and stormy night, and to go off the public streets and alleys and on to the defendant's land, so that she tried to keep on the street, and if while she was off from the street and alley she fell into a deep and dangerous hole or cellar which was upon defendant's lot and ungarded, and was injured, defendant was liable. And that a deep and dangerous hole might be only a step down, and the fact of her falling in and being injured was presumptive evidence that it was deep and dangerous.

If there is anything left for the jury, but to assess the damages, I think a jury would hardly be able to determine what it was.

We submit there are no such presumptions of law, arising from ownership or occupancy. If it is a presumption of law it cannot be rebutted and, therefore, a man may be made liable for the willful and malicious act of a stranger to him, done without his knowledge, consent or connivance. Nor do any such rights appertain to a party walking the streets. If by reason of some impediment put upon the streets by the defendant the party is compelled to leave it, and then while off the street and on defendant's land, is so injured, he might have a right of recovery, being without fault.

The 9th instruction given, puts the burden of proof to show

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negligence on the part of the plaintiff upon the defendant. This must be error.

Two elements must combine to entitle a plaintiff to recover in such an action. The defendant must have been negligent and the plaintiff without fault. The last is an essential averment in the complaint and must be affirmatively shown by the plaintiff, or appear from the facts and circumstances shown by him. How then can the burden of proof be upon the defendant and he be required to show it by a preponderance of the evidence as in such instruction given. (*Warner v. Cent. R. R.*, 44 N. Y., 470-1; *Ernst v. Hudson R. R.*, 24 How Pr., 97 and 103; 3 American, 390, *Murphy and wife v. Dean.*) The measure of damages as laid down in the 15th instruction given is improper. The *pecuniary loss* is recoverable in a suit by the husband *alone*. The doctor bills are paid by him and he is entitled to recover for loss of her services, unless in case she is conducting business for herself, and then she would be the proper and the only party entitled to maintain the action therefor, alleging the requisite facts. In no case could such damages be recoverable in suit brought by both. (24 Wis., 621, *Kavanaugh v. Janesville*; 2 Seld., 407, *Thomas v. Winchester*; 49 N. Y., 55, *Filer v. Cent. R. R.*)

*S. L. Spink and S. H. Gruber*, for appellee.

Husband and wife must be joined. (Laws of 1867-8, page 18, § 67.) Where the husband and wife are both parties to the suit either one may testify. (*Tingley v. Cowgill*, 48 Mo., 291-6; *Bennifield v. Hyppress*, 38 Ind., 498; *Birdsell v. Dunn*, 16 Wis., 250 and 496; *Maverick v. 8th Ave. R. R. Co.*, 36 N. Y., 378; *Lugate v. Pierce*, 49 Mo., 441; *Harman v. Stowe*, 57 Mo., 93.) In trespass for injuries to the person complaints and representatives of the suffering party indicative of present pain and natural symptoms, whether made before or after the suit, may be received as original evidence. (*Towles v. Blake*, 48 N. H., 92; *Taylor v. Grand Trunk R. R. Co.*, 48 N. H., 304; *People v. Vernon*, 35 Cal., 49, 50, 51; *Ills. Central R. R. Co. v. Sutton*, 42 Ills., 432 and 440; *Gray v. McLaughlin*, 26 Iowa,

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279, 28, 281; *Collins v. Waters*, 54 Ills., 485 and 486; *Monday v. State*, 32, Geo., 672; *Ins. Co. v. Mosby*, 8 Wall, 397; 1 Phillips Evidence, 232; 1 Greenleaf Evidence, 117, 118, § 102; *Earl v. Tupper*, 45 Vt., 275.) Where one person is injured through the negligent omission or act of another he is entitled to recover not merely pecuniary loss but also compensation for his bodily pains and sufferings, and this though the negligence was not gross for they are not vindictive damages. (*Morse v. Auburn & Syracuse R. R. Co.*, 10 Barb., 621; *Ransom v. The N. Y. & Erie R. R. Co.*, 15 N. Y., 415.) Plaintiffs' condition and circumstances, and the probable future duration and future effects of the injury, are to be taken into consideration by the jury in assessing damages. (*Curtis v. Rochester & Syracuse R. R. Co.*, 18 N. Y., 334; 15 N. Y., as above; *Jared D. Matteson, Resp. v. The N. Y. Cent. R. R. Co.*, 35 N. Y., 487; *Towle v. Blake*, 48 N. H., 95 and 96; Sedgwick on Damages, 123, § 109; Sedgwick on Damages, 94, note 1; 2 Dillon Circuit Court Reports, 268.) Bodily and mental suffering should be taken into consideration. (15 N. Y., 415; *Marsten v. Warren*, 27 Conn., 293; *Smith v. Derby*, 30 Geo., 241.) Where one does a legal act in such a careless way that injury to third persons may probably ensue, he is answerable in some form of action for all results of such acts. (Hilliard on Torts, Vol. 1, § 89; also pages 575 and 577.) The general rule is stated to be that it is of no consequence whether defendant intended the injury or not. In civil actions the law does not so much regard the intent of the actor as the loss or damage of the injured person. (Hilliard on Torts, 95, § 15, and note; *ibid*, 96.) A person making an excavation adjoining a public way, though it could not be dangerous to one who kept strictly in the road, is yet liable to one who accidentally deviated a little from the road and fell into the excavation. (Sherman and Redfield on Negligence, §§ 505, 399, 391, and notes 415 and 505.)

BENNETT, J.—I cannot, without extending this opinion beyond all reasonable limits, be expected to examine in detail every objection raised by appellant on the trial below, that is brought up by the record; or the correctness of the legal

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propositions embraced in each separate instruction given and refused, and shall notice them only so far as they relate to, and bear upon the points made in appellant's brief. This further appears as evidently sufficient from the consideration that the propositions discussed by counsel for appellant are primary and fundamental; and not merely technical in their character.

I. In examining the points in the order of their presentation, we are met at the threshold with the question as to the competency of husband and wife as witnesses in a cause wherein they are joined as co-plaintiffs.

The difficulties involved in this question grow out of our rather crude legislative innovations upon the common law, whereby we have attempted to sweep away a portion of the old land marks, and retain a portion, leaving our system in this respect, more or less imperfect, uncertain and contradictory.

The old rule—hoary with time, and the wisdom of which, it was supposed, had been proven by the experience of ages—that no party to a suit, and no one having a pecuniary interest in its result, could be a competent witness, has given away before modern legislation. But the legislative power has almost invariably attempted to shield the marital relations from the effect of these sweeping enactments; to what extent they have succeeded is, I confess, a vexed question of construction. This class of legislation, being comparatively recent, there are many questions arising out of it, for the solution of which, we find but few lights to guide us. Sections 319 and 320 of our Code of Civil Procedure read as follows:

“No person offered as a witness shall be excluded by reason of his interest in the event of the suit.”

“A party to an action or special proceeding, including proceedings in probate courts and proceedings for the summary recovery of the possession of land, may be examined as a witness on his own behalf, or in behalf of any other party, in the same manner, and subject to the same rules of examination, as any other witness.”



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If these provisions stood alone, there could be but little doubt as to their meaning or proper construction. Interest, of whatever nature or extent, would no longer render incompetent, not even excepting the close, intimate and inseparable identity of interest existing between husband and wife. And all parties regardless of their relations to the suit or to other parties thereto, could testify. But we find in the *proviso* that follows, some very material modifications, and limitations, and the one on which appellant grounds his objections is as follows:

“The husband can, in no case, be a witness for or against the wife, nor the wife for or against the husband, unless the contract or facts to be sworn to, are in the exclusive knowledge of such husband or wife, as agent or otherwise, in which case but one can testify, and unless in a criminal proceeding for a crime committed by one against the other.”\*

It does not appear, either from the record, or argument of counsel, that either the husband or wife, was introduced for the purpose of testifying, or that either of them did testify, to facts within his or her exclusive knowledge as agent or otherwise. But it is claimed by counsel for appellees, that husband and wife being joined, they should be permitted, as a matter of right, under the statute, to testify, generally, in their own behalf.

We are concerned then, as I understand, only with the con-

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\*These provisions have been materially changed, by the revision of 1877, (Code of Civil Procedure, section 446) and now read as follows:

“No person offered as a witness in any action or special proceeding, in any court, or before any officer or person having authority to examine witnesses or hear evidence, shall be excluded or excused, by reason of such person's interest in the event of the action or special proceeding; or because such person is a party thereto, or because such person is the husband or wife of a party thereto, or of any person in whose behalf such action or special proceeding is brought, prosecuted, opposed or defended, except as hereinafter provided:

1. A husband cannot be examined for or against his wife without her consent; nor can either, during the marriage or afterwards, be, without the consent of the other, examined as to any communication made by one to the other during the marriage; but this section does not apply to a civil action or proceeding by one against the other, nor to a criminal action or proceeding for a crime committed by one against the other.”

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struction of the first clause of this provision, which prohibits husband and wife from being witnesses for or against each other.

This is an action in which the law requires that husband and wife shall be joined, the wife could not sue alone, neither could the husband, except to recover for the loss of his wife's services, and the necessary expenses of her sickness, incurred by him. The wife is, therefore, the meritorious party; the injury was inflicted upon her person—damages must be awarded, if at all, for her pain and suffering, bodily and mental. The husband is interested, for in case of a recovery, he may collect and satisfy the judgment, appropriate and use the proceeds.

It is true his interest is contingent upon his marital relation. Should the wife die before judgment, the cause of action will not survive to the husband, but if the husband die before judgment the cause of action will survive to the wife.

So intimately connected is each plaintiff with the very subject-matter of the controversy, and so interwoven are all their respective interests in the result of the suit, that to my mind it would be exceedingly difficult to determine just wherein the husband might be testifying for the wife, or the wife for the husband, or wherein each for himself or for herself. Must they, therefore, both be excluded? The statute has made parties to an action competent witnesses, and the law compels husband and wife to be joined in actions of this kind; now can it be that so great an act of injustice was intended, as to close their mouths, and permit their adversary to take the witness stand? But it may be said that one may be permitted to testify. Which one? The statute says "*a party*," without any qualification as to the interest he may have in the suit, it may be a farthing, or it may be all the estate and reputation he has in the world. If we say the wife should testify, because she is the meritorious party, and to whom the cause of action would survive in the event of the husband's death, may we not also say that the husband should because he may reap all the pecuniary benefit.

To illustrate the doubt and confusion that gather around

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this question, I need cite but two cases. In *Monsler and wife v. Harding*, 33 Ind., 176, an action brought by Harding against Monsler and wife for slanderous words spoken by the wife, the court say: "The statute excludes the husband and wife as witnesses 'for or against each other,' but does not prohibit each from testifying in his or her own behalf; and when they are united in the same action the evidence of one of them cannot be considered in determining the issues for the other. In this case we all concur in the opinion *that the wife was a competent witness in her own behalf*, and three of the judges unite in the opinion that the husband was also a competent witness for himself." In the case of *Russ and wife v. The Steamer War Eagle*, 14 Iowa, 363, an action brought for damages for injuries sustained by the wife, the court, under a statute similar to that of Indiana, held that *the husband was a competent witness*, but that the wife could not testify, although joined with her husband, in any case, where she would not be competent if he sued alone. Considering the inseparable nature of the interest of husband and wife in this suit, and the difficulty of drawing a dividing line, and confining the testimony of each to their separate issues—for in actions of this character, and I might say in almost all actions sounding in tort, where the husband and wife are joined, the issues of one, are the issues of the other, and the interest of one the interest of the other—I should regard it as, generally, an impossibility to make practical the rule laid down in the Indiana case, *supra*, "that the evidence of one of them cannot be considered in determining the issues of the other."

It seems clear to my mind that only one of two positions can be tenable, either the husband and wife must both be excluded, or both admitted, to testify where they are joined. Although the question is not free from doubt, I hold that they should both be admitted, as being sustained by the better reason, less liable to vexatious uncertainties and complications, in accord with the spirit of the statute, and supported by the more recent authorities. (*Tingley et al. v. Cowgill et al*, 48 Mo., 291; *Monsler v. Harding*, 33 Ind., 176; *Bennifield et ux. v. Hyppress et ux*, 38 Ind., 498; *Burdsell v. Dunn*, 16 Wis., 251;

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*Sugate v. Pierce*, 49 Mo., 441; *Harriman v. Stowe*, 57 Mo., 93 )  
In the case of *Maverick and wife v. Eighth Avenue R. R. Co.*,  
36 N. Y., 378, an action brought for the recovery of damages  
for injuries to the wife, Judge Scrugham, in delivering the  
opinion of the court, discusses this question in the following  
brief, but clear and comprehensive manner:

"The testimony of the plaintiff, Augustus Maverick, was properly received. The question is not whether he can be a witness for his wife, but whether, being a party, he must be debarred from testifying in his own behalf, because his wife is also a party to the action. If the result of the action could only effect the wife or her separate property, and he was merely a nominal plaintiff, having no pecuniary interest whatever in the result, and he should be offered as a witness, the question as to his inadmissibility on account of his marital relations to the real plaintiff in interest would be presented. \* \* \* But in cases like this before us the husband has a direct pecuniary interest in the result. \* \* \* As the law stood at the time of the injury on account of which this action was brought, and judgment rendered, the husband was entitled to the money which should be recovered in his life time for injuries to the person of his wife; and the necessity for making the wife a party to such action arose from the fact that the damages would survive to the wife, if the husband died before they were recovered. The interest of the husband was direct and immediate, while that of the wife was uncertain and contingent. He had the right as a real party in interest to be examined as a witness in his own behalf, and the circumstances that his wife might be benefitted by his testimony if he should die before recovery, is merely incidental, and would not justify the exclusion of his testimony."

It does not appear, from the reported case, that there was any objection raised as to the wife testifying.

The Supreme Court of Iowa, has reached the same position, but in a different manner. That court holds that the incompetency of either to testify for the other is a personal privilege, which, under their construction of a peculiar statute, may be waived by the one desiring the evidence of the other,

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and this is done simply by the husband calling the wife, or the wife the husband, as a witness.

In the State of Ohio, under a statute providing that husband and wife should not be competent witnesses for or against each other, the Supreme Court excluded both when they were joined, while the opposite party could be a witness. (*Robinson et al v. Chadwick*, 22 Ohio St., 527.) This very unjust and inequitable rule, called forth an amendment by the legislature, February 14, 1859, providing that "in actions where the wife, were she a *femme sole*, would be plaintiff or defendant, either the husband or wife may testify, but not both." And on this plain provision of the statute all subsequent decisions of that court, in which the question was involved, have rested.

The legislature of Massachusetts, relieved the courts of that state, from any trouble on the point, by enacting that where husband and wife were parties, they might testify for or against each other.

The case of *Hasbrouck v. Vandervoort*, 5 Seldon, 153, cited by counsel for appellant, was an action brought by the trustee of the wife, and not a case wherein husband and wife were joined, and was decided under the following statute:

"No person offered as a witness shall be excluded by reason of his interest in the event of the action."

"The last section shall not apply to a party to the action, nor to any person for whose immediate benefit it is prosecuted or defended, etc."

The case of *Stein v. Bowman*, 13 Peters, 217, also cited by appellant's counsel, was not an action in which husband and wife were joined, nor even where the wife was called to testify for the husband, but where she was called to *discredit* him; *to prove in fact that he had committed perjury*. And that high tribunal say: "Can the wife, under such circumstances, either voluntarily be permitted, or by force of authority be compelled to state facts in evidence which render infamous the character of her husband. We think most clearly that she cannot be." And I may say, that the reasoning in this case answers the objection that may be urged, that if husband and wife when joined are permitted to testify, the opposite party

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may compel them to testify one against the other. Such a result by no means follows. They are excluded from testifying for each other on the grounds of interest, and from testifying against each other on the higher and broader grounds of public policy. If they can be compelled or permitted to testify against each other on one thing, why not all, (except to disclose confidential communications made by one to the other) and even to impeach and contradict each other. Incompetency on the ground of interest may be removed, and no perceptible injury result therefrom; but who could forecast the disaster that might follow the abrogation of that wise and wholesome rule, that is founded in public policy—a rule that regards as utterly insignificant the interest which a litigant may have in the result of any suit, when weighed against the sanctity of the marital relations, and the peace and concord that should exist between husband and wife. In the language of the court in the case of *Stein v. Bowman*, supra, “this rule is founded upon the deepest and soundest principles of our nature. Principles which have grown out of those domestic relations, that constitute the basis of civil society, and which are essential to the enjoyment of that confidence which should subsist between those who are connected by the nearest and dearest relations of life. To break down or impair the great principles which protect the sanctities of husband and wife, would be to destroy the best solace of human existence.”

An exception to a general statute, should be strictly construed, and when the statute provides that no person shall be incompetent as a witness on the ground of being a party to the suit or in interest, then such person must come clearly within the exception before he can be excluded. The statute plainly prohibits husband and wife from testifying for or against each other, but does not prevent each from testifying for himself or herself; and the circumstance that each might be benefited by the testimony of the other, in actions wherein they are joined, is no good reason for excluding their testimony.

From the very silence of our statute on the subject of husband and wife testifying when they are co-plaintiffs or co-

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defendants, we may reasonably presume it was intended they should occupy the same position, with the same right to testify, as other partis to a suit, and there I am content to leave them.

II. It is insisted by appellant that there was error in admitting evidence of the complaints and declarations of plaintiff, Anna Sanders, made to the witnesses, as to her injuries and sickness. The argument of counsel is based upon the proposition, that there is no longer a necessity for the rule, under which this evidence was admitted, and it being based wholly upon necessity—that being the reason of the rule—and the reason failing the rule should cease. The necessity, it is claimed, grew out of the rule of evidence prohibiting a party to a suit, or in interest, from testifying in his own behalf; but this disability being removed by the statute, there is no longer a necessity for giving in evidence the declarations of a party, and therefore the reason of the rule ceases.

The fallacy of this position consists in the alleged reason for the rule. In one sense, all evidence is received as a matter of necessity, there being no other means by which courts and juries can determine the issues in controversy. But it is claimed that this is hearsay and secondary, and it was only admitted because it was the best in degree that could be produced. I do not so read or understand the authorities. In the case of *The Ins. Co. v. Masley*, 8 Wallace, 397, the Court say: "Wherever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings are original and competent evidence. Those expressions are the natural reflexes of what it might be impossible to show by other testimony. If there be such other testimony, this may be necessary to set the facts thus developed in their true light, and to give them their proper effect. As independent, explanatory or corroborative evidence, it is often indispensable to the due administration of justice. Such declarations are regarded as *verbal acts*, and are as *competent as any other testimony, when relevant to the issue.*" Now after stating the law in these strong and unmistakable terms, what can that court mean by saying, "such evidence

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must not be extended beyond the *necessity* upon which the rule is founded?" We are not to presume that that high tribunal spoke unadvisedly, or that it was blind to, or ignored the fact that in this country as well as in England, parties to suits are competent witnesses in their own behalf. Besides, the language of that opinion will not bear a construction consistent with appellant's theory. It is there spoken of as "original evidence." A term used by law writers in contradistinction to "hearsay," (1 Greenl., § 101) as "the natural reflexes of what it might be impossible to show by other testimony, or necessary to set the facts developed by such other testimony, if there be any, in their true light, and give them their proper effect." "Indispensable to the due administration of justice, as independent, explanatory or corroborative evidence," and that "such declarations are regarded as *verbal acts*." Could there be stronger reasons stated for the admission of any evidence? Judge Allen in his opinion in the case of *Reed v. The N. Y. Cent. R. R. Co.*, 45 N. Y., 574, in commenting on the case of *Goodwin v. Harrison*, 1 Root, 80, says: "The court placed the admission upon the ground of necessity, there being no other method of proving the fact," and then adds: "The same rule of evidence was approved, and for the same reason in *Caldwell v. Murphy*, 1 Ker., 416, and in *Wesley v. Persons*, 28 N. Y., 344."

From an examination of these cases I am unable to find where the court, in either case, rests the reason of the rule on the ground that there was no other method of proving the fact, in the sense in which Judge Allen uses that expression, unless it is to be inferred from the phrase—"from the necessity of the case," a form of expression which seems to have been frequently used by courts in a very indefinite manner, and it is not always easy to determine just what meaning they intended to convey. I certainly think we are not warranted in concluding they meant by it a necessity arising from the incompetency of the plaintiff to testify. It would seem at least, the court in the case of *Wesley v. Persons*, *supra*, could not have used it in that sense; for at the time that case was decided (1863) parties were, and had been for



several years, competent witnesses in their own behalf, under the statutes of New York. *La Farge v. The Exchange Fire Ins. Co.*, 22 N. Y., 352, (decided in 1860, and tried in the lower court in 1857.)

After a review of the authorities, I incline to the opinion, that all that the courts can mean by the use of the phrase under consideration, is, that necessity growing out of the inherent difficulties connected with an inquiry into, and the very nature of the proof required to show, the mental and physical condition of an individual. From the nature of the case, that condition can only be known as it finds expression in external symptoms, and in the common complaints of pain and distress, which are the natural concomitants of illness and physical injury.

But if this class of testimony is original and not hearsay, and does not fall within the rule which excludes the declaration of a party in his own favor, (and it is so held in *Cadwell v. Murphy* and *Wesley v. Persons*, supra,) then it seems clear that the reason of the rule insisted upon by counsel for appellant, is not correct. "In a prosecution for conspiring to assemble a large meeting, for the purpose of exciting terror in the community, the complaints of terror made by persons professing to be alarmed, were permitted to be proved by a witness, who heard them, without calling the persons themselves." (*Regina v. Vincent et al*, 9 C. & P., 275.)

The only authority cited by appellant in support of his position, is the case of *Reed v. N. Y. Cent. R. R. Co.*, supra, and in that case the opinion on this point was concurred in by a minority of the court.

The general doctrine is clearly laid down by both Phillips (Vol. 1, 182) and Greenleaf (Vol. 1, § 102) "that when it is material to inquire as to the bodily or mental feelings of a party, the usual expressions of such feelings, made at the time in question are in the nature of original evidence." A rule that has long been imbedded in the law of evidence, followed, not doubtingly, as Judge Allen says, but firmly; questions have doubtless frequently arisen as to its application, but seldom as to its wisdom or correctness, and I fail to see any

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reason now why it should be disregarded. It is a matter of the highest importance that the law and rules of evidence should be stable, and a rule which has been so generally recognized and followed, should not be annulled by courts, unless the reason for the same is very plain and unquestionable.

III. The third point to be noticed in appellant's brief, relates to the question of trespass, as presented in the instructions, by him asked, and refused by the court.

The theory of the case, on which the instructions given by the court, rest, seem to exclude from the jury the consideration of this question, and I think properly so. The allegation in the complaint is that this excavation was deep and dangerous, and in close and dangerous proximity to the street and alley, and that the plaintiff, Anna Sanders, without fault or negligence on her part, in passing along said street, wholly unaware of danger, fell into said excavation and was injured. The court instructed that it was incumbent on plaintiffs to prove, "1st, the existence of the hole or cellar on said lot; 2d, that it was deep and dangerous; 3d, that it was so near a public street or alley as to be dangerous under ordinary circumstances to persons passing upon the street or alley, and using ordinary care to keep upon the proper path."

On the question of dangerous proximity the court instructed as follows: "Persons have an undisputed right to be upon the street or alley and upon every part of them up to the very line, and where there is nothing to define the line, they are not held to an accurate knowledge of it. And an excavation made near to a street or alley, though not dangerous to one keeping strictly in the street or alley, yet if so near that a person deviating a little therefrom, is in danger of falling in, it is in dangerous proximity. The location of the excavation and the probable danger of persons falling therein, either during the day or in the darkness of the night, are to be considered by you in determining this question."

Now if under these instructions the jury found that the excavation was not in dangerous proximity to the street or alley, then plaintiffs could not recover; but if they found it

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was, and that Anna Sanders, while using ordinary care to keep upon the public highway, fell into it and was injured, then upon this branch of the case plaintiffs were entitled to recover, regardless of the question of a technical trespass, which had it been presented as asked by appellant, could have had no other effect than to confuse or mislead the jury. Wharton lays down the doctrine, in his work on negligence, section 346, that "a trespasser, notwithstanding his trespass, may have redress for negligent injuries inflicted on him. In such case the maxim applies—*injuria non-excusat injuriam*. Even though he is liable to an action for the injury which he does, he does not necessarily forfeit his right of action for an injury which he has sustained, *ex gr.* by falling into a hole newly excavated on defendant's premises, adjoining to a public way, and rendering it unsafe to persons lawfully using the way with ordinary care."

Sherman and Redfield in their work on negligence, section 38, lay down the same doctrine: "The mere fact that the plaintiff, when he suffered the injury, was technically trespassing on the defendant's land, does not deprive him of all remedy for the defendant's negligence, if his trespass does not involve negligence on his own part, substantially contributing to his injury."

In the case of *Chapman v. Porlane*, 3 S. D., 585, Hay 29, cited in a note to above section, "the defendant was proprietor of an unfinished house, in which there was a sunk flat, beneath the level of the street. On a dark night the plaintiff, while passing, stepped aside into the doorway or entry of the building for a necessary purpose, and there being no fence or barrier across it, fell into the sunk flat, and broke her thigh bone. Held, that the defendant was liable."

In *Loomis v. Terry*, 17 Wend, 496, the plaintiff's son, while trespassing in the defendant's woods, in the day time, without any evil intention, was severely bitten by two ferocious dogs of the defendant, who was held liable for the damages. And in the case of *Sawyer v. Jackson*, 5 N. Y. Leg. Obs., 380, the defendant was held liable for an injury inflicted by his dog

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upon a boy who came into defendant's premises in the day time, in pursuit of a ball.

Stress is laid upon the fact that appellant had a legal right to dig a cellar on his own premises. Certainly he had. So had the man the right to keep a dog, and make a sunk flat within the enclosure of his unfinished building, but he must take care of the one if ferocious, and guard the other if dangerous, so that harm may not come to others thereby.

I apprehend the particular character of the instruments or causes of injury is unimportant, in contemplation of law, except so far as it may affect the question of the degree of care and negligence with which they are used, kept or constructed. It would seem to me to be a strange rule of law that would permit the owner to sink deep and dangerous excavations on his uninclosed premises, near to a public highway, in a densely populated city, leave it without guard or protection, and hold him not liable in case a person, accidentally or unintentionally steps across the line, falls in, and is killed or injured, simply on the ground that the party injured was guilty of a *technical* trespass, and yet make the proprietor respond in damages who places spring guns in his *inclosed* vineyard, whereby a *willful* trespasser is shot and wounded.

If the owner may make his excavation five feet deep, why not five hundred? A fall into the one might fracture a limb; into the other would be more certain death than a discharge from the spring gun, and yet is not a man as much entitled to protection of limb as he is of life?

Under this view of the law, were the instructions given by the Court on this point correct? The rule is stated by Sherman and Redfield on Negl. § 505, that "the occupant of land is under no obligations to strangers to place guards around excavations made by him, unless such excavations are so near a public way as to be dangerous under ordinary circumstances to persons passing upon the way, and using ordinary care to keep upon the proper path, in which case he must take reasonable precautions to prevent injuries happening therefrom to such persons." And I think the doctrine well settled, both by English and American authorities, that the obstruc-

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tions or nuisances need not be directly in the road. It is enough if they are so close to it as to make traveling dangerous. In the case of *Hadley v. Taylor*, Law Rep., 1 C P., 53, the plaintiff, in passing along a highway at night, fell into a "hoist hole", which was within fourteen inches of the public way, and unfenced. It was held that the hole was near enough the highway to constitute a nuisance.

Pollock, C. B., in the case of *Hardcastle v. South Yorkshire Railway Co.*, 4 H. and N. 67, says: "When an excavation is made, adjoining to a public way, so that a person walking upon it, might, by making a false step, or being affected with sudden giddiness, or in the case of a horse or carriage way, might by the sudden starting of a horse, be thrown into the excavation, it is reasonable that the person making such excavation should be liable for the consequences." And he lays down this rule: "We think that the true and proper test of legal liability is, whether the excavation is substantially adjoining the way." In that case, the stone buttress, over which plaintiffs intestate walked into the reservoir and was drowned, was seven or ten yards from the public pathway, and it was held that it was not substantially adjoining. Wharton, in his work on negligence, § 885, says: "It is sufficient here to say, that while a person opening near a public highway a dangerous hole or ditch, is bound to fence it in, yet the dangerous place must be sufficiently near the public way to make it probable that persons traveling the public way might be hurt." And he cites the case of *Binks v. The South Yorkshire Railway Co.*, 3 Best and S. 244. Where the canal in which the person was drowned was twenty-one feet from the public foot path, defendant was held not liable.

The fact of the excavation being outside of the public highway was held to be immaterial, if it rendered travel on the highway unsafe. In the case of *Stack v. Portsmouth*, 52 New H., 221, the court say: "The instruction that the defendants were not liable unless the want of a railing on the street rendered the street unsuitable and unsafe for the public travel thereon, was sufficiently favorable to the defendants. \* \*

\* \* The jury must find the street to be insecure, or the

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defendants were not liable." And the court adds: "It is manifest that under the instructions, the jury must have found the street unsafe." The doctrine is laid down in the case of *Barnes v. Ward*, 9 C. B., 392, in almost the exact language of the instruction in this case, "that one making an excavation adjoining a public way, though it could not be dangerous to one who kept strictly in the road, is yet liable to one who deviates a little from the road and falls into the excavation."

This question was fairly left to the jury, and they must have found the excavation deep and dangerous, and in dangerous proximity to the public highway, thereby rendering it unsafe to the traveling public.

IV. Appellant excepts to the third instruction, given the jury by the court, which reads as follows:

"Defendant having been, as admitted by the answer, the owner and occupant of the lot at the time of the injuries complained of, the law presumes that whatever hole or cellar may have been dug on the lot, was dug by him, or by his direction, or remained there with his knowledge and consent."

If there is error in this instruction, it is clearly error without prejudice. The digging of the cellar by defendant is substantially admitted in the answer, and shown by the evidence, while there is no offer on the part of defendant to show that it was not dug by him or by his permission, or remained there with his knowledge and consent, and nothing in the record even tending to prove it. So I may also say of the instruction on the measure of damages, in which the court below says that plaintiffs may recover for pecuniary loss, if any proven. The record does not disclose that there was any evidence introduced even tending to prove pecuniary loss, and we are not to presume the jury found what was not in the evidence.

V. It is claimed by appellant that the court erred in instructing the jury that "negligence on the part of plaintiff is a mere matter of defense, to be proved affirmatively by the defendant, of which you must be satisfied by a preponderance of the evidence, though it may of course be inferred from the

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circumstances proved by the plaintiffs. The law will not presume contributory negligence on the part of plaintiffs."

The decisions in the different states are very conflicting on this point, but so far as this court is concerned, it is effectually set at rest by the case of *Railroad Company v. Gladman*, 15 Wal., 401. In that case Mr. Justice Hunt, in delivering the unanimous opinion of the court, says: "The plaintiff may establish the negligence of the defendant, his own injury in consequence thereof, and his case is made out. If there are circumstances which convict him of concurring negligence, the defendant must prove them, and thus defeat the action. Irrespective of statute law on the subject, the burden of proof, on that point, does not rest upon the plaintiff."

After a careful examination of all the authorities, the same rule is laid down as the better law by Sherman and Redfield, § 44, and by Wharton, § 423, and I deem it unnecessary to elaborate the point further. Upon the case before us the judgment of the court below must be

**AFFIRMED.**

SHANNON, C. J. CONCURS.

BARNES, J., dissents from that portion relating to the admission of evidence of the declarations of the injured party as to the state of her health and injuries, and on all other points, concurs.

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1. **INJUNCTION: WHEN GRANTED: RULE.** An injunction will not be granted to restrain the doing of an act which is unlawful and irregular, unless substantial and positive injury will result from a refusal to grant the writ.
2. ———: ———: ———. An injunction will never be granted when it will be productive of hardship, oppression or injustice, or public or private mischief.
3. ———: ———: ———. The granting or refusing an injunction rests in the sound discretion of the court, and will never be granted when the benefits secured by it to one party is of but little importance, while it will operate oppressively, and to the great annoyance and injury of the other party; unless the wrong complained of is so wanton and unprovoked in its character, as

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properly to deprive the wrong doer of the benefit of any consideration as to its injurious consequences.

4. **ACTION: PARTIES: JOINDER.** Two or more persons cannot for themselves, and on behalf of other tax payers of the county, be joined in an action to restrain the proper officers from paying county warrants, alleged to have been issued without authority of law, and to have them adjudged illegal and cancelled.
5. ———: ———: ———. Money for the payment of county warrants can only be raised by taxation, and such taxation must effect the property of all tax payers alike, and persons having no common right or common interest in the property taxed cannot join in an action to restrain its levy or collection. *Argu:*—the tax is upon and against the individual property of each tax payer, and that if there is any injury, it is an injury to the property and rights of each tax payer alone, and not an injury affecting a common right or interest.
6. **CONTRACT: ILLEGAL: EQUITABLE RELIEF.** E and C, under a contract with the board of county commissioners, erected for the county a court house building; no proceedings were instituted to prevent the execution of the contract, or to restrain the issuance of warrants for work done until the building was completed, and accepted by the board. *Held:*—that before any action could be maintained by or on behalf of tax payers for equitable relief on the grounds of the illegality of the contract, there should be restored to the contractors what they had expended in labor, money and material.
7. **LEGAL REMEDY: WHEN PURSUED.** Where a statute confers upon public officials, authority to do an act, and the same statute points out the remedy to any party aggrieved, such party must pursue his legal remedy, and will not be granted relief in a court of equity.
8. ———: ———: ———. Where by statutory provision a party aggrieved has an appeal to the District Court from any decision of the board of county commissioners upon any matter properly before them, such legal remedy must be pursued, and equitable relief cannot be invoked.

### *Appeal from Bon Homme County District Court.*

THIS is an action brought by certain citizens and tax payers of Bon Homme county against the county commissioners, clerk and treasurer of said Bon Homme county, English and Calhoun, contractors, and others, holders of warrants issued on said contract, to restrain the issue, receipt and collection of certain county warrants of said Bon Homme county, in accordance with a contract entered into by and between the county commissioners of Bon Homme county, and English and Calhoun, contractors for the erection of a court house in said Bon Homme county, which contract plaintiffs allege to



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be unauthorized under the statutes, illegal and void, and pray that the same may be declared null and void; that the warrants already received be delivered up and cancelled, and the commissioners be perpetually enjoined from further issue of such warrants under the contract.

The action was tried by BARNES, J., at the October term of the District Court, Bon Homme county, in 1873, and a decision made and filed on the 2d day of February, 1874, in which he finds that the commissioners were authorized to enter into the contract without submitting the question to the voters of the county, but that the issue of the warrants to be paid out of the taxes of 1874 was unauthorized until the arrival of the time for the levy of the tax of 1874. And as to these warrants, the temporary injunction was continued in force until the levy of such tax, and as to all other things was dissolved, to which findings and conclusions plaintiffs except and appeal from the decree entered therein to this court.

*Bartlett Tripp*, for appellants.

Plaintiffs claim that the contract was unauthorized on the part of the county commissioners and therefore void. That counties at most are only quasi corporations, and have no powers to act except as expressly given by statute, and all who deal with them are bound to know the extent of their power to contract. (*Soper v. Henry County*, 26 Iowa, 267; *Williams v. Peinny et al*, 25 Iowa, 436; Fry on specific performance, 216, note [1]; *Aetna Ins. Co. v. Harvey*, 11 Wis., 212; 46 Mo., 505; Dwarris on Statutes, 275, 20 N. Y., 312.) If then they have power to erect public buildings it is derived from the statute in general or express terms; if the power is expressly given, by that we must be governed, and not by the general enumerated powers. The power is expressly given under one statute: (Laws of 1868-9, page 174, § 27.) So we are saved any examination of the general powers given to the commissioners.

It is claimed by defendants that this section which gives them express power and authority to contract for and erect court houses, by implication gives them authority to provide

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means for the payment of the same. There would be force to the argument if the same statute which provides for the erection did not also provide means and the manner of paying therefor. If this section 27, or the first part of it stood alone, there would be some authority for the position. But the rule is the other way, where a statute gives a power and at the same time gives a means of exercising it, and is put very tersely by Chief Justice Parsons that: "When a statute gives a new power and at the same time gives a means of executing it, those who claim the power can exercise it in no other way." (*Franklin Glass Company v. White*, 14 Mass., 286-9; Dwaris on statutes 275, note 5, cases cited; *Stewart v. Otoe County*, 2 Neb., 177.) To be sure the commissioners may erect court houses but they must erect them in the way pointed out by chapter 4, laws of 1868-9, and no other. Section 18 provides that they shall have power to submit to the people of the county any question involving an extraordinary outlay of money by the county, and it is contended that this is not an extraordinary outlay of money. It might not be for a populous county—it would not be for the city of New York. But what would be an extraordinary outlay for Bon Homme county if this was not one? It is admitted that the total valuation for 1873 was not to exceed \$150,000, and that the tax allowed to be levied for county purposes could not exceed 4 mills, and that the valuation for 1874 would not exceed \$200,000, which would make the highest rate for all county purposes that could be raised in those two years, \$1,400, and yet it is claimed that a proposed expenditure of almost two and a half times the entire revenue of the two years covered by the contract, was not an extraordinary one. The county commissioners of Bon Homme county made a contract to pay \$3,333 out of the revenue of the years 1873-4, the amount of which could not exceed \$1,400 in all, and based upon the valuation of 1873 would amount to but \$1,200. Of course what is to be considered an extraordinary outlay is to be decided very much by surrounding circumstances and the evidence adduced of the valuation, the amount of tax allowed by statute, etc. But the legislature itself has furnished a

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solution of the question and given a definition in section 109, page 305, laws of 1868-9, in the words: "If the county commissioners deem any expenditure necessary, greater in amount than can be provided for by the annual tax, they shall require a vote of the county thereon, either at a general election or one called especially for the purpose." And as if with intent to point out how the public buildings of the county are to be erected, and to limit the taxation for the same, the very section that provides for their erection provides also that the amount of taxes to be levied for county purposes shall be levied according to this same chapter 4, and chapter 25 of 1868-9. If then the question turns upon whether the erection of the court house involves an extraordinary outlay of money, we claim the court erred in finding in the face of the testimony and statutes that it was not an extraordinary outlay.

But we claim the erection of a court house of this character comes within the "public buildings," provided for by section 22 of same chapter 4, page 173, and if so within the rule of Chief Justice Parsons, above cited, that when a new power is given and a means of executing it is also given, it can be executed in no other way. There can be no doubt but the county commissioners have given them the express power to erect county buildings. It is also clear they have no such power outside of the statute—no common law power. It is also clear, that the statute gives them the power to incur an indebtedness therefor in a certain way. Can they then incur the indebtedness in any other way than the one pointed out by statute? The authorities above cited say they cannot.

Again, if the expenditure was not such an extraordinary outlay of money as the statute contemplates should have been submitted to the people, the contract was void and illegal in this, that the commissioners contracted to pay for the court house in warrants to be issued on or before November 1, 1873, the sum of \$3,333, one-half of that sum to be paid out of taxes to be levied in 1874. They contract to draw \$1,666.50 in warrants upon the taxes of 1873, and \$1,666.50 upon the taxes of 1874, when the highest tax that could be raised upon the valuation of 1873 was \$600, and the estimated valuation of

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1874, \$200,000, was \$800—an excess of \$1,066.50 in 1873, and \$866.50 in 1874, over all the taxes of these years permitted to be levied without a vote of the people, and these warrants were to be issued, by the contract, as the work progressed, the last payment to be made on the completion of the building November 1, 1873. Now if the court holds that under the statute of 1868-9 the county could incur the indebtedness of the erection of the court house in any other way than as therein provided, it had no power to contract to issue "county warrants amounting in the aggregate to a sum larger than the county tax for the year in which they are issued, unless the county commissioners shall first be authorized by a majority of the legal votes of said county. (Chap. 25, laws of 1862, pages 261-2; 1 Clinton Dig., 445, title "Buffalo," § 2.)

The statute expressly declares such issue unlawful. Did not the county commissioners of Bon Homme county contract to issue "warrants amounting in the aggregate to a sum larger than the county tax levied for the year in which they are issued?" Is not \$3,333 larger than \$600? Is not the half sum to be paid out of taxes of 1873 larger than \$600? And if the issue of such warrants is declared to be unlawful, is not the contract to issue them also unlawful? The court below finds that the issue of the 1874 warrants was unauthorized and sustains the injunction as to these until the levy of 1874. Upon what ground the court sustains the injunction for that time is not clear. There is only one ground under the statute upon which the injunction can be sustained, and that is that the issue of warrants is larger than the county tax; and upon that ground why should not the issue of warrants upon 1873 taxes be restrained equally with those upon the taxes of 1874? It is clear that the "aggregate" sum referred to in the statute of \$3,333 is larger than the county tax of 1873, and it is equally clear that the half sum of \$1,066.50 is also greater than the county tax of that year, and exceeds it by \$1,066.50.

The court seems to have held the issue of the 1874 warrants unauthorized, because they were to issue before the levy of the tax of 1874; and in the fourth (4th) conclusion of law the Court says that the issue of these warrants "is unauthorized

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until the arrival of the time for the levy of the tax to be made." Unless the court took this view of the statute, why should it restrain the issue of the warrants until the levy of the tax and no longer? Plaintiffs contend this is not the proper construction of this statute, but that if the county commissioners can contract any indebtedness greater than can be provided for by the annual tax they can issue warrants for such indebtedness; that if they can contract an indebtedness to be paid in 1876, they can issue warrants payable in 1876; that if the statute of 1862 admits of this narrow construction, that no warrants can issue in excess of the tax of that particular year in which the warrant is issued, then it follows that if the tax of any particular year amounted to \$1,500, and there was a surplus of \$1,000 in the treasury, yet it could not be drawn out because the law says you cannot issue warrants to an amount exceeding the county tax of that year; and though you have a surplus of \$1,000 in the treasury you cannot reach it because your issue of warrants would exceed the tax levy of that year. Plainly no such construction can be given, but it means: the warrants upon that particular tax levy shall not exceed the levy, and taken in connection with the other statutes cited requires the county commissioners to submit such subjects of expenditures to the legal voters of the county. This injunction, then, should have been continued, not because the whole amount \$3,333 exceeded the tax levy of 1873, but the whole issue should have been restrained because the amount of \$1,666.50 to be paid each year exceeded the actual levy of 1873, and the amount that could be levied in 1874.

But if the narrow view of this statute taken by the defendants and which the court below seems to have followed, be the correct one, the result at which the court arrives in regard to plaintiffs' claim is incorrect, for if the issue of warrants is to be controlled by the levy of *the year* in which they are issued, then clearly the county commissioners of Bon Homme could issue for county purposes but \$600 in the year 1873, while the proof is they contracted to issue \$3,333; so that under either construction the commissioners contracted to do what the court below

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says they were unauthorized to do. If they contracted to do what they were unauthorized to do, was it not an illegal contract? Could English and Calhoun maintain specific performance of this contract? Suppose English and Calhoun had brought suit against the county commissioners to compel specific performance of this contract it will hardly be contended that the court could compel the defendants in such suit to issue warrants in contravention of an express statute, and yet it does not require so strong a showing on the part of the tax payer or person not directly a party to the illegal contract to avoid it, as it does on the part of him who, a party thereto, seeks to take advantage of such illegality in a suit upon such contract. (Fry, Specific Performance, 223, [153.] § 324, §§ 325, 326, 327, 328, and N. 2, 3.) If then the contract was unauthorized, which has been found by the court below, what was the proper course to be taken? There is but one remedy known to the courts, either to sustain or avoid the contract made by the parties. Neither courts of law or equity make contracts for parties. Judge Cole, in *Heath v. Van Cott*, 9 Wis., 516, says: "It is admitted by all that it is the duty of courts simply to enforce contracts precisely as the parties have made them, instead of making new contracts for them to meet the emergencies of a particular case, or to avoid some supposed inconvenience or hardship arising from the natural import of the written engagement." And this is the doctrine of all the cases. Therefore when the court reached the conclusion that the contract was in part illegal, it should have held it was wholly illegal, for the contract was an entire one and not susceptible of division; and if part of the consideration was illegal, it was all illegal, and the prayer of complainant should have been granted. (*Benski v. Paige*, 36 N. Y., 537; *Bigelow v. Law*, 5 Abb., 455; *Otis v. Hamson*, 36 Barb., 210; *Brady v. Mayor, etc.*, 20, N. Y., 312; *Wright v. Weeks, et al.*, 25 N. Y., 153; *Thayer v. Rock*, 13 Wind., 53; *Mackie v. Cains*, 5 Cow., 547; *Burt v. Place*, 5 Cow., 431.) Instead of which the court in effect said the contract you have made is illegal, but you might have made a legal one by contracting to issue the warrants after the levy of 1874, and as you are before me and

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the contractors ask to have it done, I will so change the contract, and order the county commissioners to issue these warrants in accordance with the new agreement I have made for you. Suppose the county commissioners had refused to obey this decree, could it have been enforced? And if it could not be enforced it was clearly an improper decree to enter upon the findings of the court below.

The injunction then should have been made perpetual and the relief asked for by plaintiffs should have been granted, and the decree appealed from should be reversed.

*Moody & Cramer*, for appellees.

The findings of fact by the judge is equivalent to the verdict of a jury, and unless manifestly against the weight of evidence, will not be disturbed.

The conclusions of fact arrived at are not only against the weight of evidence, but clearly sustained by the evidence, to-wit: that the expenditure contemplated could be paid out of the ordinary revenue without necessitating the borrowing of any money, or the raising of any special tax.

The submission of a question to a vote of the people is only necessary when a special tax is proposed to be levied in addition to that authorized by the revenue law, and such is evidently the meaning of the statute. (§§ 18, 19, 20, 21, chap. 4, laws of 1868-9, pages 172-173.) The statute required the providing of a court house and county offices by the county, and this contract and management was very economical, judicious and fortunate for the county, and within the power and authority of the commissioner. (§ 19, chap. 1, laws of 1867-8 page 6; § 27, chap. 4, laws of 1868-9, page 174.) The plaintiffs have no cause to complain of the decree. It was more favorable than they had a right to demand, and prevented the issuing of the warrants until the tax was levied to cover them. Thus the provisions of the law were strictly and technically complied with. Certainly no one can pretend but what it was the duty of the commissioners to provide a court house such as was suitable and proper (and there is no pretense that this was an extravagant outlay) and, if necessary,

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to incur an indebtedness for the purposes. The only objection that could be argued is, that by statute, warrants should not be issued faster than the tax is levied to provide for them, and that objection is wholly removed by the order the court below made.

BARNES, J. This action is brought by the plaintiffs, residents and tax-payers of Bon Homme county, against the defendants, Bangs, Zitka and Donley, as county commissioners of Bon Homme county, George J. Rounds, treasurer of said county, A. M. English and H. H. Calhoun, as contracting parties for the building of a court house for Bon Homme county, and W. A. Burleigh and A. J. Faulk, persons having purchased and holding county orders, issued to English and Calhoun, in payment on said court house contract, and by them transferred to defendants Burleigh and Faulk.

The plaintiffs ask that a certain contract, made between the commissioners on the part of the county, and English and Calhoun, the contractors for the building of the court house, be set aside, annulled and declared void, that the county warrants issued in pursuance of that contract, and in the hands of Burleigh and Faulk, be returned and cancelled, the same having been issued without authority of law, and that the treasurer, Rounds, be perpetually enjoined from paying warrants issued in payment for building the court house.

The court below refused the demands of the plaintiffs, and judgment was entered for the defendants. From that judgment the plaintiffs appeal.

The first question to be considered is this: Under what circumstances will a court of chancery interfere by injunction to restrain the acts of a corporation, or the acts of an administrative officer or board?

An injunction will not be granted to restrain the doing of an act which is unlawful and irregular, unless substantial and positive injury will result from a refusal to grant the writ. (High on injunction, § 9.) An injunction will never be granted when it will be productive of hardship, oppression or injustice, or public or private mischief. (9 Wisconsin, 166.)



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The court of equity will not interfere or restrain the execution of a deed for land sold for taxes, on the ground that the tax proceedings were irregular or void, unless it further appears that the tax proceedings are inequitable, and that it would be against equity and good conscience to refuse the writ. See U. S. Digest, § 6, vol. 1, new series, and cases there cited, 14 Wis. 618. See also, *Pettibone v. The Milwaukee & LaCrosse R. R. Co.*, 14 Wis., 443. In the case just cited the court uses this somewhat significant language: "The inconvenience which would result from an injunction, adds great weight to the reason for refusing it."

The granting or refusing an injunction rests in the sound discretion of the court, and will never be granted when productive of hardship, oppression or public mischief. Injunctions will not be granted when the benefit secured by it to one party is of but little importance, while it will operate oppressively, and to the great annoyance and injury of the other party, unless the wrong complained of is so wanton and unprovoked in its character as properly to deprive the wrong doer of the benefit of any consideration as to its injurious consequence. (20 New Jersey, 1869, page 530.)

An injunction will not be granted when the injury complained of is slight compared to the inconvenience to the defendant and the public that would result from the granting the injunction. (20 New Jersey, 435.) But perhaps the strongest case bearing on this question is that of *Kneeland v. The City of Milwaukee*, 15 Wisconsin, 414. The legislature of Wisconsin passed a law allowing the railroad corporations to pay a certain per centage upon their earnings each year to the state treasurer, in lieu of all taxes, state, county and municipal. This mode of taxation had been followed for a number of years, when the present case was before the court. The court declared the act of the legislature void, as being in conflict with the provision of the state constitution which provides that taxation shall be equal, and both the Chief Justice and Justice Paine, in unmistakable language declare that, whatever the consequence of their decision may be, they being satisfied that the law referred to was in violation of the pro-

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visions of the constitution, they must and will so declare it. It was soon discovered that that decision would unsettle and make void a large proportion of the assessments and collection of taxes in the state for several years past; that the confusion, embarrassment and litigation that would flow from it would be disastrous. They therefore ordered a re-argument of the case, and while adhering to their former expressed opinion that the law was unconstitutional, yet, in view of the disastrous consequences that must follow their decision, they reverse that decision, and thus allow the wrongful, unequal and inequitable tax to be collected, and this, too, solely upon the ground that granting the plaintiff that which the court says he was equitably entitled to, would work a great hardship to the public generally.

I will now consider the facts in this case, and for the purpose of this argument, and that only, will assume that the county commissioners exceeded their authority, and will also assume for the purpose of this argument, that the plaintiffs, as tax payers, unitedly have a right to maintain this action.

From the facts disclosed in this case, it appears that by an act of the Legislature of the Territory, two terms of the district court are required to be held in Bon Homme County each year. It further appears that the county has no court house nor place for holding court or transacting county business, nor is there any place at the county seat that can be procured by the county for that purpose. The law makes it the duty of the commissioners to provide a place for holding court, and the transaction of other county business. The law also authorizes them to make contracts for the erection of county buildings, and also to make contracts for the repair of the same, whenever necessary. From these facts it clearly appears that there was a pressing, if not an imperative necessity for action on the part of the county commissioners.

Recognizing this necessity, they assemble at their usual and accustomed place of meeting, they cause public notice to be given that proposals will be received for the building of a court house. Proposals are submitted to them, are duly examined by them, and the fact disclosed that the defendants,

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English and Calhoun, are the lowest responsible bidders, and to them is awarded the contract for building the court house. The plaintiffs, it appears, or some of them, are present at these meetings, and enter their objection or protest against the action of the board. Now, we will not stop to inquire whether these plaintiffs feeling aggrieved by the action of the commissioners, should not have appealed from that decision, and whether that was not the proper and only remedy. But we examine the action of the commissioners for the purpose of noting the fact that they appear to have acted in perfect good faith—an important consideration in an equity proceeding.

It further appears that the contract was made with the defendants, English and Calhoun, to build the court house, for the sum of three thousand, three hundred and thirty-three dollars. That that sum was to be paid in county warrants. It also appears conclusively that it was worth in cash to build the court house the sum which the defendants English and Calhoun received, or were to receive in warrants, and it appears with equal clearness that these warrants were in part worth not to exceed fifty cents on the dollar. I think, too, it also appears from the evidence that the defendants Burleigh and Faulk, being solicitous for this improvement, purchased these county warrants of English and Calhoun, and paid their face or par value. Be this as it may, the fact nevertheless appears that Bon Homme county have their court house at about one half its value, when we reduce the warrants, in which payments for the improvement have been made, to a cash basis. From the statement it will be at once seen that the building of the court house has not depreciated the value of county warrants. It should now be observed that the defendants, the commissioners, in contemplation of law, represent all the residents, the tax payers and free holders of their county; that they thus represent the plaintiffs, who, being tax payers have no interest that is not an interest in common with all tax payers.

Assuming, therefore, that the commissioners exceeded their authority in entering into a contract in the precise terms of

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this contract, or assuming even that this contract is void, the question of the building of the court house not having been submitted to a vote of the electors, the fact is nevertheless clear that the commissioners have so discharged their duty that the tax payers of the county have secured the building of a court house, absolutely and indispensibly necessary for the county, and on terms exceedingly advantageous to the tax payers, the plaintiffs included.

I thus reach the conclusion that the plaintiffs suffer no loss, present or prospective, by refusing the injunction asked for. That on the contrary, it is clear the defendants would suffer irreparable loss and injury by setting aside and declaring void the contract for the building of the court house, and granting the injunction asked for.

But another, and equally important question is this: Can persons having no interest except that which is common to all the tax payers, maintain a suit in equity to set aside the acts of town or county officials? A leading case, and one that seems to me to be decisive of this question, is the case of *Doolittle v. The Supervisors of Broome County*, 18 N. Y., 155. The opinion is by Justice Denio. The object of this suit was to obtain a judgment declaring null and void a certain act of the board of supervisors of Broome county, by which that board divided the former town of Chenango into three towns, to be called respectively Chenango, Binghampton and Port Craine. The plaintiffs, seventeen in number, representing themselves to be, and to have been for more than four months, residents and free holders of that part of the town of Chenango, which, by the act of the board of supervisors, was sought to be erected into a separate town, by the name of Port Craine. They state that they commence the action on behalf of themselves and all other persons who have an interest with themselves in restraining the organization of the new towns. The court say: "The first question is this: Has the plaintiffs such an interest as will enable them to maintain this action? This raises a question of much importance, which if it be now doubtful, ought to be definitely settled. It is not pretended that the plaintiffs have any interest which is not in common

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with all resident free holders of the proposed new town of Port Craine. The grievance is that they are all threatened to be subjected for the purposes of local administration to a jurisdiction not created according to law. This will affect not only the other free holders besides the plaintiffs, but all the inhabitants of that local district, whether they are free holders or not. Assuming that the proceedings under which the new towns are proposed to be organized, were void, as claimed by the plaintiffs, no private interest of the plaintiffs' has been invaded, and no injury peculiar to them is threatened." The court further say: "The acts of the supervisors have no bearing on the plaintiffs' individual interest. Whatever concerns they have in the question belongs to them only as citizens, and members of the community. If this action can be sustained, then any tax paying citizen may compel the public authorities to litigate in the courts the acts of any administrative board or officer in the state, and thus proceedings of this kind can only be perfected by the judgment of the court of final appeal. Every person may legally question the constitutional validity of any act of the legislature which affects his private rights, but if a citizen may maintain an action for such a purpose, in respect to his rights as a voter and tax payer, the courts may regularly be called upon to revise all laws that may be passed. They may at the instance of any tax payer be required to enjoin the comptroller from drawing warrants on the treasurer, and that officer from paying them, in every case where it may be conceived that the law authorizing the expenditure was passed without constitutional authority. The state tax of 1855 was lately impeached upon plausible grounds as having been unconstitutionally enacted. This was done by a direct proceeding by the attorney general against the board of supervisors. But upon the plaintiffs position in this case, the state and county officers might be compelled to litigate the question of constitutionality with every tax payer, and thus the fiscal business of the state would be transacted mainly in the courts. The law, in my judgment, does not afford such an opportunity for excessive litigation."

No private person or number of persons can assume to be

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the champions of the community, and in its behalf challenge the public officers to meet them in the courts of justice to defend their official acts. In the case of *Hale v. Cushman*, 6 Metc , 425, a town in Massachusetts had passed a vote to pay certain expenses, which the plaintiffs who were legal voters, and who together were liable to pay more than one half of all the taxes to be assessed on the inhabitants of the town, claimed to be illegal. They filed a bill to enjoin the payment. The bill was dismissed upon the ground above recognized. This, too, is an elementary principle. Blackstone says: "It would be unreasonable to multiply suits by giving to each man a separate right of action for what damnifies him in common only with the rest of his fellow citizens." (Book 4, 167. See also 16 Howard, term reports, 512 and 137; 19 How., 525, and 35 How., 82; 27 N. Y., 348. This case refers to the decision in 18 N. Y., 157, and expressly approves the same.

In *Newcomb v. Horton*, 18 Wisconsin, 566, the plaintiff sues in behalf of himself and other tax payers of a school district to prevent the collection of a tax to pay a certain judgment fraudulently obtained, and to cancel the judgment. The first objection is in substance that the respondent could not bring this action in his own behalf, and on behalf of several tax payers of the school district. That there is no common right or common interest of those persons in the property affected by the tax. That the tax is upon and against the individual property of each tax payer, and that if there is any injury, it is an injury to the property and rights of each tax payer alone, and not an injury affecting a common right or interest, and this objection must prevail.

There is no general or common interest affected by the assessment tax in this case. The property is owned in severalty, and each tax payer may sue alone and obtain a complete relief, so far as his rights and property are concerned. There is no necessity for one tax payer to unite another with him in a suit for this purpose. It is true, selling land for an illegal or void tax would be injurious to all persons whose property was sold. But this does not prove that one tax payer may bring this suit for himself and others. Their rights and inter-

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ests are entirely distinct, and one tax payer may obtain complete relief without making another a party. From a careful examination of all the cases I have been able to find, I am satisfied that the doctrine enunciated in the above cases is sound and may be safely followed.

It occurs to me that in holding to the contrary (holding that two or more tax payers may unite in one action) is to assume that because the same state of facts exist, as touching each of the tax payers, and because the same defense may be interposed in each case, that that constitutes a united and joint interest. That cannot be true. But to authorize two or more tax payers to unite in the same action, it must appear that the lien if created, or the tax if collected, would be collected from property owned in common.

There is still another consideration not to be lost sight of, which I will only allude to, namely: that generally a party that comes into court asking for equitable relief must first restore that which he has received from the defendants. It may be said that these plaintiffs have received nothing from the defendants. That answer will not suffice. The tax payer has, in fact, received the labor, material and money of the defendants English and Calhoun, and if these plaintiffs now represent the tax payers of Bon Homme county, and as such, seek to set aside and avoid the contract under which English and Calhoun performed valuable services and expended their money, then these tax payers must do that which is equitable.

I come now to the consideration of the only remaining question which I regard as important in this case. Section 27, chapter 4, laws of 1869, gives the county commissioners authority and power to erect and repair court houses, jails and other county buildings, and expressly authorizes them to make contracts for that purpose. Section 31 of the same chapter authorizes an appeal from the decision of the commissioners upon all matters properly before them, by any person aggrieved, to the District Court of the county. Section 34 provides, that all appeals taken from the decision of the commissioners shall be docketed as other causes pending therein, and the same shall be heard and determined *de novo*.

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Section 35 provides that the District Court shall render final judgment, and cause the same to be executed, or the District Court may send the same back to the commissioners with an order how to proceed, and require the board to comply with the order by mandamus or otherwise. Here, then, is a plain, simple, sensible, cheap and adequate remedy given by statutes to all persons aggrieved by the action and decisions of the board of commissioners.

The record in this case discloses the fact that the plaintiffs well knew of the action of the commissioners; they were, in fact, present and protested, as appears of record, against the action and determination of the board. If they were dissatisfied it was their duty to have pursued the remedy given by statutes. Here is a plain statute empowering the commissioners to build a court house, and the same statutes gives all parties aggrieved by the decision of the commissioners, the right of appeal. It seems hardly necessary to cite authorities in support of this position, that where a statute confers upon public officials authority to do one act, and then the same statute points out the remedy secured or given to all parties aggrieved, that the aggrieved party must pursue his legal or statutory remedy, and that such aggrieved party has no standing in a court of equity. See 15 Wallace, 227. This is the language of the Court.

It has been insisted by the counsel for the appellants that there is a complete remedy at law, and that the bill must, therefore, be dismissed. Such must be the consequence if the objection is well taken.

In the jurisprudence of the United States this objection is regarded as jurisdictional and may be enforced by the court though not raised by the pleadings nor suggested by the counsel. See also 2 Black, 551, and 15 Wallace, 373, and cases there cited.

We are, therefore, unanimously of the opinion that so much of the preliminary injunction as remains in force, should be dissolved, and that this action be dismissed.

It is accordingly ordered, adjudged and decreed that said



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injunction be dissolved, and the action dismissed, at the proper costs of the appellants; and the court below is directed to take such further proceedings in the premises as may be required by law.

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46*	606

## THE PEOPLE V. ODELL.

1. **INDICTMENT: SURPLUSAGE.** A count in an indictment charging an assault with intent to kill and to murder, although the statute does not use the words "with intent to murder." *Held:*—good, the words *and to murder* being mere surplusage and therefore immaterial.
2. ———: **SEVERAL COUNTS: SUFFICIENCY.** Where an indictment contains several counts, if one is good, and sufficient to sustain the judgment, it will not be reversed or set aside on the ground that there is a count that is bad.
3. **ASSAULT WITH INTENT TO KILL: DIVISIBLE.** The crime of assault or assault and battery with intent to kill is divisible into degrees, and the defendant may be convicted of the offense charged or of any lesser offense necessarily embraced therein.
4. ———: ———: **PROOF.** It is enough to prove so much of the indictment as shows that the defendant has committed a substantial crime therein specified, or one that is necessarily included in, and forms a constituent element of the higher offense charged.
5. **INTOXICATION: EVIDENCE OF: WHEN ADMISSIBLE.** Where an offense is divisible into degrees, evidence of intoxication is admissible for the purpose of enabling the jury to determine the purpose-motive or intent with which the act was committed.
6. ———: **DEGREE: WHEN A DEFENSE.** Intoxication may not under any circumstances be regarded as a defense, excuse or justification for the commission of crime, unless in case of a person who performs an act under such a state of intoxication as to be unaccompanied by volition, when he has lost control of his will, and is incapable of forming a purpose.
7. **SABBATH: INSTRUCTIONS TO JURY.** A jury that has retired to deliberate upon their verdict, may request and receive additional instructions on the Sabbath, or the Judge may on that day upon his own motion have the jury brought in and re-instruct them, for the purpose of correcting a supposed error or mistake in his former charge.
8. **DEADLY WEAPON: USE OF: PRESUMPTION.** There being, under the provisions of the Penal Code, felonious assaults by the use of deadly weapons, other than assault with intent to kill. *Held:*—erroneous to instruct the jury that "where an assault or assault and battery is made with a deadly weapon, there is a presumption of an intent to take life, and can only be rebutted by proof that it was excusable or justifiable.

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*Writ of Error to Yankton County District Court.*

THE defendant was indicted and tried in the court below, BENNETT, J., presiding, for the crime of an assault and battery with intent to kill. During the progress of the trial, and while one G. O. Erickson was being examined as a witness on behalf of defendant, the counsel for defendant asked the following question: "What was defendant's condition as to being intoxicated or under the influence of liquor at the time this occurred?" meaning the shooting alleged against defendant.

To this question the district attorney objected as irrelevant and incompetent, which objection the court sustained, and defendant excepted. The trial was concluded and the cause submitted to the jury at 9 o'clock on Saturday evening. On the next day, Sabbath afternoon, the jury not having agreed, the Judge on his own motion, had the jury brought in and re-instructed them, for the alleged purpose of correcting a supposed error or mistake in his former charge, to all of which defendant excepted. The jury retired and shortly returned into court a verdict of guilty as charged in the indictment. Motions in arrest of judgment and for a new trial were presented and overruled, and defendant sentenced to three years' imprisonment at hard labor in the penitentiary.

*G. C. Moody, S. L. Spink, Bartlett Tripp and S. H. Gruber,*  
for plaintiff in error.

*J. R. Gamble,* District Attorney, for the People.

BENNETT, J. I. We are all of opinion that the motion in arrest of judgment was properly overruled. The indictment is sufficient. There are three counts; two charge substantially an assault, or assault and battery with intent to kill, and the third with intent to kill and murder. Admitting that there is no such crime known to our statute, as an assault with intent to murder, the count containing the charge of an intent to kill, the addition of "and to murder," would be mere sur-

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plusage, and therefore immaterial. But there remains two counts against which this cannot be urged, and if there is one count sufficient to sustain the judgment, it will not be reversed on the ground that there is one that is bad. (*Bruguier v. The United States*, ante 5.) The objection that the indictment was found by a grand jury of the county of Yankton and not of the subdivision of the territory which includes the county of Yankton, is not well taken. The statute creating subdivisions provides that all causes shall be entitled and process run in the name of the county in which the court is held, and we know of no statute that provides for a grand jury to be known as the grand jury of a subdivision.

We need only say on the question as to the verdict, that it is in proper form. The charge in the indictment is single, plain and explicit, and when the jury say we find the defendant guilty as charged in the indictment, it is as certain and unequivocal as if they had named the crime of which they convicted him.

II. The first assignment of error, and which has been strenuously urged by counsel for defendant, is the exclusion of the evidence of the intoxication of defendant. It would seem that the court below held to the opinion, that the crime with which defendant was charged, was not by statute divided, and from its nature was not divisible into degrees, and that if the jury found that the assault or assault and battery was made with a deadly weapon, defendant could not be convicted of a simple assault and battery, there being no such a crime known to the law as a simple assault or assault and battery with a deadly weapon. This question becomes material, when we come to consider it in connection with § 17, Penal Code, which reads as follows:

“No act when committed by a person in a state of voluntary intoxication is less criminal by reason of his having been in such condition. But when the actual existence of any particular purpose, motive or intent, is a necessary element, to constitute any particular *species or degree* of crime, the jury may take into consideration the fact that the accused was in-

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toxicated at the time, in determining the purpose, motive, or intent with which he committed the act."

In cases of homicide, evidence of intoxication is admitted, to be considered by the jury in connection with all the testimony, in determining the degree of the crime. And the statute above quoted is but the embodiment of the general doctrine. Judge Denio, in delivering the opinion of the court in the case of *The People v. Rogers*, 18 N. Y., 9, uses the following language: "It must generally happen, in homicides committed by drunken men, that the condition of the prisoner would explain or give character to some of his language, or some part of his conduct, and, therefore, I am of opinion that it would never be correct to exclude the proof altogether." If admissible in cases of homicide, there can be no good reason, why it should not be in all crimes which the statute divides into degrees, or which are clearly so divided by inferential construction, and such is unquestionably the intent of the statute.

Is the crime with which defendant is charged susceptible of division into degrees? That is, does it necessarily embrace other crimes? We are of opinion that it does, (*The State of Iowa v. Shepard*, 10 Iowa, 126.)

That the man who commits the crime of an assault and battery with intent to kill, *ex necessitati*, has also committed the lesser offenses of an assault, assault and battery and an assault with intent to do bodily harm, and when charged with the higher might be convicted of either of the lower. Section 402 of the Code of Criminal Procedure, provides that "the jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or of any attempt to commit the offense." In the case of *The People v. English*, 30 Cal., 214, the defendant was charged with "an assault with a pistol, with intent to kill and murder," and the jury found him "guilty of an assault with a deadly weapon with intent to inflict a bodily injury," and the Court say: "The offense for which the defendant was indicted was of a higher grade than that for which he was convicted, still as the offense of which

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he was found guilty is included in the crime with which he was charged, the verdict is to be followed by the same consequences that would have attended it had the indictment charged the lesser offense in terms." In the case of *Beckwith v. The People*, 26 Ills., 500, the indictment was for an assault with an axe and a butcher knife with intent to commit murder," and the verdict was, "guilty of an assault with a deadly weapon, with intent to inflict a bodily injury." The Court say, "the rule of law is, that where an indictment charges many acts, with certain aggravations constituting a high crime, the jury may convict the prisoner of a lesser crime, consisting of only a portion of those acts, or with aggravation. The question here presented then, is, does the charge of an assault with a deadly weapon, as an axe or a butcher knife, with intent to commit murder, embrace an assault with a deadly weapon, with intent to commit a bodily injury? or still more to simplify the proposition, does a murder embrace within it a bodily injury? When a case of murder is pointed out, without a bodily injury, we may begin to doubt, till then we cannot." After a very full and able examination of the question, the same doctrine is held by the Supreme Court of Pennsylvania in the case of *Hunter v. The Commonwealth*, decided November, 1875, Pittsburg Legal Journal, Vol., 6 (N. S.) 53. And this, too, notwithstanding a statute, that makes a party charged with the commission of a misdemeanor, a competent witness in his own behalf, a privilege not accorded to one charged with a felony. A fact bordering very closely on the reason for the old English rule, that would not permit a conviction for a misdemeanor, under an indictment for a felony.

When a count in an indictment contains a divisible averment, it is the province of the jury to discriminate and find the divisible offense; and this distinction runs through the whole criminal law. It is enough to prove so much of the indictment as shows that the defendant has committed a substantial crime therein specified, or one that is necessarily included in, and forms a constituent element of, the higher offense charged.

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It therefore seems to be the settled law, that a defendant tried on indictment for assault and battery with intent to kill, may be convicted either of the crime charged, or of an assault or assault and battery with intent to do bodily harm, or for assault and battery, or for a simple assault. That being the case it must necessarily follow, that there was error in excluding the evidence of intoxication. It is possible, as urged by the district attorney, that it was error by which defendant was not, and could not have been prejudiced. It is not every degree of intoxication that can properly be considered by the jury, and there are, doubtless, cases in which it would be proper for the court to direct the jury that it ought to have no influence upon the case. Great care should be exercised in the introduction of this class of evidence, and its consideration by the jury, so that it may not under any circumstances be regarded as a defense, or excuse or justification for the commission of crime, unless, in case of a person who performs an act, under such a state of intoxication, as to be unaccompanied by volition, when he has lost control of his will, and is incapable of forming a purpose.

In the case of *The People v. Rogers*, supra, the court below charged the jury, "that intoxication never excused crime, unless it was of such a degree as to deprive the offender of his reasoning faculties." And Judge Denio, in commenting on this instruction, says: "In the proposition as it was thus given to the jury there was no error. No rule is more familiar than that intoxication is never an excuse for crime. There is no Judge who has been engaged in the administration of criminal law, who has not had occasion to assert it. Even where *intent* is a necessary ingredient in the crime charged, so long as the offender is capable of conceiving a design, he will be presumed, in the absence of proof to the contrary, to have intended the natural consequences of his own act. Thus if a man without provocation shoot another, or cleave him down with an axe, no degree of intoxication, short of that which shows that he was at the time, utterly incapable of acting from *motive*, will shield him from conviction." And that learned Judge further holds that if the per-

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petrator would escape the consequences of an act thus committed, it is incumbent on him to show either—that he was incapable of entertaining such a purpose, or that the act was committed under provocation. And if the latter, the question of intoxication might properly be left to the consideration of the jury. Not to enable them to find in it an excuse for the crime, but to aid them in determining the purpose, motive or intent with which the act was committed.

This most able opinion of Judge Denio is largely quoted from, and the doctrine which it holds, followed and strongly sustained in the case of *Kenny v. The People*, 31 N. Y., 390. Judging from the evidence before us, the defendant was not in such a state of intoxication as deprived him of his reason, or rendered him incapable of forming a purpose or design, but that the act was not done upon a sudden quarrel, or in the heat of passion, or that there might not have been some provocation is by no means clear, and therefore we cannot say that he might not have been prejudiced by the exclusion of the evidence of intoxication.

III. It appears from the record that the jury was charged and retired to consider their verdict about nine o'clock on Saturday night, and that at three o'clock on Sabbath afternoon, the jury not having agreed, the Judge, on his own motion, had them brought in and delivered to them further instructions by way of correcting a supposed error in his former charge, and this is assigned as error. It is claimed that this, being a judicial act, cannot be done on the Sabbath. The Sabbath being *dies non juridicus*, it is doubtless the well settled general rule that no judicial acts can be done on that day. But the jury being out, they are not permitted to separate until they have agreed upon their verdict, or are discharged by the court from further consideration of the case. The code of criminal procedure provides (§ 388) that "while the jury are absent the court may adjourn from time to time as to other business, but it is nevertheless deemed open for *every purpose connected with the cause submitted to them, until a verdict is rendered or the jury discharged.*" There is no question as to the right of a jury to bring in a verdict, and the court to receive it

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on that day. The very reason for receiving the verdict is that they may not be compelled to remain in the jury room during the entire day. If they were unable to agree from a failure to understand alike the instructions on a certain point, would they not have the right to come in and ask to be instructed on that point, or must they wait until Monday morning? It is not seriously contended that they would not. If this is conceded *a fortiori*, would the judge have the right, and would it not be his duty to recall the jury on that day, and correct an error in his charge, and thereby prevent an erroneous verdict, that would necessitate a new trial, or let the guilty go acquit? What can the statute mean when it says "the court shall be deemed open for every purpose connected with the trial," if it does not include this? Is it not a purpose connected with the trial to reinstruct the jury, either on their request, or on the judge's own motion, for the purpose of correcting a mistake? We certainly regard it as a question on which there should be no reasonable doubt.

IV. The only remaining question which we deem it necessary to notice is in relation to the following instruction given by the court:

"Where an assault or assault and battery is made with a deadly weapon, there is a presumption of an intent to take life, and can only be rebutted by proof that it was excusable or justifiable."

This instruction, in so far as it lays down the doctrine of the presumption of intent arising from the use of a deadly weapon, is correct. Men are presumed to intend the natural and legitimate results of their own acts, and if an assault is made with a deadly weapon, which in all human probability will produce death, it is a presumption in fact that the intention is to take life. But there are other felonious assaults by the use of deadly weapons, besides an assault with intent to kill. Section 290, penal code, provides that "every person who shoots or attempts to shoot at another with any kind of fire arms, air gun, or other means whatever, or commits any assault or battery upon another by means of any deadly weapon, or by such other means or force as was likely to



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produce death, with intent to commit any felony other than an assault with intent to kill, \* \* \* is punishable" etc. Also section 308: "Every person who, with intent to do bodily harm, and without justifiable or excusable cause, commits an assault upon the person of another, with any sharp or dangerous weapon, or who, without such cause, shoots, or attempts to shoot at another, with any kind of fire arms, air gun," etc. It would seem clear from these provisions alone that a person may assault another with a deadly weapon, without being excusable or justifiable, and yet without the intent to take life. Under this instruction, if the jury found that defendant made the assault and battery with a deadly weapon and was neither excusable nor justifiable, although they might be satisfied it was with intent to do bodily harm, or to commit some other felony, yet it would seem rather difficult for them to find a way of escape from convicting of the crime charged. It is true the court had instructed the jury that they must be satisfied beyond a reasonable doubt that the assault, or assault and battery was made with the intent to kill, but the court then made their "satisfaction" to depend on another fact, viz.: was it justifiable or excusable. Of the assault and battery with a deadly weapon—a shot-gun—there was no controversy or conflict in the evidence. This was narrowing the issue down to a very small point, and leaving the jury but little to say or do in connection with the question of the guilt or innocence of the accused. Under the view of the law of this case which we have taken, this instruction is clearly erroneous.

V. We find no error in the ruling of the court admitting the evidence of Ella Engle, as to what they in the house heard defendant say when he rode up to the window. None of the witnesses examined on the part of the people as to the threats made by defendant at the window were in the house at the time they heard them. A witness on part of defense, A. J. Springer, had testified that she and the witness, Ella Engle, were in the house, and that no such threats were made, and undertook to repeat the language of defendant when at the window. We think it was entirely proper for the prosecution to prove what was heard by others in the same room, occupy-

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ing the same relative position to defendant, with the same opportunities, and no greater, to hear what defendant said at that time. They were differently situated from any of the witnesses who had testified on the part of the people, and the prosecution had introduced no evidence as to anything that had been said, done or heard in the house. It was important in connection with the immediately subsequent conduct of these women; their fright and alarm; their sudden flight up stairs; their attempt to conceal themselves, etc.; all taken together, strongly tending to the impeachment of the witness, A. J. Springer.

VI. It is only necessary to say that all the instructions asked by counsel for defendant were properly refused, as the court in each one was asked to charge substantially that if the jury found the assault and battery was made with a deadly weapon, but not with intent to kill, they could not convict of a lighter offense than assault and battery. As we have construed the law, they might have found him guilty of an assault or assault and battery with intent to do bodily harm, a higher degree of the offense charged than assault and battery.

For the errors herein pointed out, the judgment of the court below must be reversed, and the cause remanded for a new trial.

REVERSED.

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1. **CHOSSES IN ACTION: CONVERSION: MEASURE OF DAMAGES.** The legal presumption is that choses in action are worth the amount of principal and interest indicated on the face of the instrument at the time of conversion, and that amount with legal interest thence to the trial is *prima facie* the measure of damages.
2. ———: **PRESUMPTION OF VALUE: HOW REBUTTED.** It is incumbent on defendant to show in reduction of damages the fact of payment in whole or in part; the inability of the maker to pay wholly or partially; a release of the maker from his undertaking; the invalidity of the instrument, or other matters which would legitimately affect or diminish its value.

1 206  
1 234  
1 236  
2 67  
2 70  
2 111  
2 373  
6 180  
46\* 689  
2\* 259  
9\* 98  
42\* 29  
47\* 779  
47\* 780

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3. **NONSUIT: WHEN DENIED: RIGHTS OF PLAINTIFF.** A peremptory non-suit cannot, in this Territory, be ordered against the will of the plaintiff. He has a right by law to a trial by jury, and to have the case submitted to them. He may agree to a non-suit, but if he does not so choose, the court cannot compel him to submit to it.
4. **PERSONAL PROPERTY: ACTION TO RECOVER: DAMAGES.** The jury, in the trial of an action for the recovery of specific personal property, may give the plaintiff not only actual damages for the detention, but if the defendant has been guilty of fraud, malice or oppression, may also award exemplary damages for the sake of example, and by way of punishing the defendant.
5. **VERDICT: JUDGMENT: INVALIDITY.** In an action for the recover of specific personal property, where the ownership is put in issue by the pleadings, the jury returned the following verdict: "We, the jury, find that the plaintiff is entitled to the possession of the property, and find its value to be \$650, and assess his damages to be \$75." *Held*, that the jury having failed to pass on all the issues, to-wit: that of ownership, no valid judgment could be entered on the verdict.
6. **————: ———: ———.** A verdict which finds but part of the issues, and says nothing as to the rest, is insufficient, because the jury have not tried the whole issue, and is not sufficient to sustain a judgment.
7. **PRACTICE: ERROR OF RECORD: WHEN FIRST URGED.** When a judgment is rendered upon an insufficient verdict, all the material issues not having been passed upon and disposed of by the jury, the error may be urged for the first time in the supreme court.

*Appeal from Minnehaha County District Court.*

THE plaintiff brings this action for the recovery of certain specific personal property. Jury trial. Verdict and judgment for plaintiff. Defendant appeals. The further facts necessary to an understanding of the points decided are fully stated in the opinion.

*Bartlett Tripp, and S. W. Packard, for appellant.*

This was an action under the code for the claim and delivery of personal property. The plaintiff in his affidavit averred that he was "the owner" of the property which he sought to recover, not that he had "a special property therein." After issue was joined, the jury returned the following verdict:

"We, the jury, find that the plaintiff is entitled to the possession of the property, and find its value to be \$650.00, and assess his damages to be seventy-five dollars.

W. H. RICHARDS,  
Foreman."

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Whereupon the defendant made a motion to set aside the verdict, which the court overruled, and the defendant duly excepted. Upon this verdict the following judgment was rendered: "That the plaintiff recover of the defendant the possession of the personal property described in the complaint, or \$650 in case a delivery of said property cannot be had, and also that he recover seventy-five dollars damages, together with \$8.38 costs, amounting in the whole to \$83.38." From this judgment and the order of the court denying the motion for a new trial, the defendant appeals.

1. The court erred in refusing to allow the defendant to ask the following question of the plaintiff on cross-examination: *Question*—"What is the market value of these notes, payable to your order, without your endorsement, in the market at Sioux Falls, at the time this suit was commenced?"

2. The court erred in overruling the defendant's motion to non-suit the plaintiff.

3. The court erred in overruling the defendant's motion to set aside the verdict because the same is against the law and the evidence.

A gratuitous depository or bailee can only be made liable for the loss of the property by showing that he has been guilty of gross negligence. (Civil code, §§ 927 and 929; 2 Kent Comm. 11th Ed., top 750, side page, 580; Story on Bailments, 8th Ed., § 62, and cases there cited.

"The accidental loss or destruction of a bill of exchange by the drawee, to whom it has been presented for acceptance, is not a conversion." (*Salt Springs Nat. Bank v. Wheeler*, 48 N. Y., 492.) Held, in the same case, that a demand and a refusal to deliver do not constitute a conversion, when at the time of the demand the property in question is not in existence. To same effect, see 13 Fla., 501.

"This action is based upon a wrongful detention of the property, and such wrongful detention must exist at the commencement of the suit." (2 Estee's Pl. and Pr., 210, § 84, citing *Savage v. Perkins*, 11 How. P., 17, 23. See also Abbot's Forms, Ed. of 1875—page 510 in note "N", citing same case as above in 11 How. 17.) The complaint in this case did not authorize

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anything but nominal damages. At common law the plaintiff was required to plead specially, in order to recover any damages which were not the necessary result of the act complained of, though they might be the natural consequences of the act. (2 Greenlf. Ev., 10th Ed., § 254, on pages 236-7-8, and cases there cited; 1 Chitty's Pleading, 14th Am. Ed., 396.) In Mayne on Damages (Ed. of 1872) page 296, it is said in speaking of the action of Trover: "Special damages may be recovered in this form of action *if laid, but not otherwise.*" And on page 308, in speaking of the action of Detinue, it is said: "The rules as to assessing the value of the goods, damages for the detention, etc., are just the same as in Trover." To the same effect, see also Sedgewick on damages, 4th Ed., top page 549, side page 475, and in notes and the cases there cited.

But whatever may be the rule at common law, we submit that under our code of procedure which requires (§ 95) the complaint to state the facts, the plaintiff is bound to apprise the defendant if he claims damages, how they accrued, and what they consist of. The rule of the common law practice is changed by the new codes of procedure, which require the statement of the actual facts, and not merely the averment of their legal effect. (Sedgewick on Damages, top page 685 in note 2, citing *Gurney v. Fowler*, 4 Sandf., 665.) Next we insist that even if the plaintiff had made proper averments in his complaint, still he was not authorized in this case, under the evidence, to recover anything but nominal damages. The question of exemplary damages cannot arise in this case, because there was no fraud, oppression or notice.

The value to be accepted as a substitute for the property (under section 214 of the code of procedure) is the value at the time of trial, and the damages are such as arise from the loss of use, or from depreciation. (Wait's anntd. code 519 in note "B" and page 464 and 465 in note "E", citing *Brewster v. Silinean*, 38 N. Y., 423; *Young v. Willett*, 8 Bosw. 486.) "In replevin of securities for the payment of money bearing interest, a verdict for the defendant will entitle him to nominal damages only where it does not appear that he has sustained actual loss. (*Bartlett v. Brickett*, 14 Allen [Mass.] 62.)

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Section 1863 of the Civil Code provides the rule of damages in actions for the *conversion* of personal property and *not* in actions for the recovery of the property in specie. First, because the word "conversion" *ex vi termini* confines the provision to actions of Trover. Second: The next section—1864—shows conclusively that the section in question only applies to actions of Trover, because it says expressly that the subsequent application of the property for the benefit of the owner without his consent shall not repel the presumption that the plaintiff's damages are the highest market value of the property between the conversion and the verdict, or if he elect, the value of the property at the time of the conversion and interest from that time to the trial.

But in this amalgamated action under the code for the recovery of the possession of the property, the gist of the action is the recovery of the goods in specie; the defendant has the option of restoring the goods, and even after judgment that option remains in him and can be exercised by restoring the goods. And a judgment is erroneous which does not give him that option. (*Carson v. Applegarth*, 6 Nev., 187; *McNamara v. Eisenloff*, 14 Abb. Prac. (N. S.) 25; *Dwight v. Enos*, 5 Selden (N. Y.) 470; *Fitzhugh v. Winner*, *ibid*, 559; *Rockwell v. Saunders*, 19 Barb., 473; 2 Nash Pl. and Prac., 833, and cases there cited; *Ragus v. Bradford*, 8 Bush. (Ky.) 163.) And as the recovery of the property in specie is the object of the action, it fails altogether if the defendant before suit either return or offer to return the goods. In such a case the plaintiff cannot recover *any* judgment against the defendant even for costs. And as the damages for the detention of the property are an *incident* to the action they fall with the action itself. In such a case if the plaintiff would recover damages sustained by him in keeping the goods he must resort to another action of a different character such as Trover or Case. (Wait's Annotated Code, 371, in notes "H" and "K," and cases there cited, being the following: (*Christie v. Corbet*, 34 How, 19; *Spalding v. Spalding*, 3 *ibid*, 297; *Daws v. Green*, 3 How, 377; *Savage v. Perkins*, 11 How, 17, 23.) The court erred in refusing to set aside the verdict, and also in rendering judgment because the jury failed to find upon the issue of prop-

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erty in the plaintiff. The denial in the answer of any knowledge or information sufficient to form a belief, was a proper way of forming an issue. (Code of Procd., § 102; Code of Procd., § 121; Wait's Ann. Code, 242 and 311; Wait's Ann. Code, 243 in note "F," and 244 in note "K," and the cases there cited; 1 Archibald's *Nisi Prius*, 486; 2 Chitty's Procds., 492; 6 Robinson's Prac., 514, 515 and 516, and the cases there cited; 2 Nash Pl. and Pr., 834 and 483, and cases there cited.) The issue being properly made it was the duty of the jury to pass upon it, and their omission to do so is ground for reversal. (See 1 Archibald's *Nisi Prius*, 115, 116 and 117; Wait's Ann. Code, 264 and 464 in note "B," and cases there cited.) This section is the same as 260 of the New York code. See Wait's Ann. Code, 264; and it has been there held that the requisites of a special verdict under the code are the same as prior to the code. See Wait's Ann. Code, 264, note "B." (*Welbaum v. Wellers*, 7 Abb., 90.) It may be stated as a general universal rule that juries by their verdicts must respond specially to all the issues made by the pleadings; and that if they omit one, their verdict will be set aside, or if judgment be rendered thereon it will be erroneous. (*Levan v. Rays*, 4 Wis., 50; *Hambleton v. Dumpey*, 20 Ohio, 168; *Lettler v. Alison*, 8 Geo., 201; *Van Benthuyssen v. De Witt*, 4 John., 212; *Car v. Stevenson*, 5 Humps., 636; *Jewitt v. Davis*, 6 N. H., 518; *Patterson v. U. S.*, 2 Wheaton, 221; *Garland v. Davis*, 4 How. (U. S.) 131.) A special verdict must contain all the facts upon which the judgment of the court must rest; nothing is to be taken by implication or intendment when there is a special verdict, but whatever is not found in it is not supposed to exist. (*Berks & Co. v. Pile*, 18 Penn. St., 493; *Pittsburg R. R. Co. v. Evans*, 53 Penn. St., 250; *Thayer v. The Society of U. Brethren*, 20 Penn., 8 Harris 60.) A special verdict must expressly present all of the material facts, so that nothing shall remain for the court but to draw from them the conclusions of law. (*Knickerbocker Mining Co. v. Hall*, 3 Nev., 194; *Loch v. Church*, 10 Ohio (N. S.) 48; *Runge v. Dawson*, 9 Wis., 246.) "No fact not stated in the special verdict can be inferred from the facts found." (*Phillips v. Hill*, 3 Texas, 397;

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*Garland v. Davis*, 4 How. (U. S.) 131.) "A verdict is bad, if it varies from the issues in a substantial manner, or is found on only a part of that which is in issue." (*Patterson v. U. S.* 2 Wheat., 221; *Bennett v. Watson*, 1 Mich., 272; *Middleton v. Quigly*, 7 Holst., 352.) The general rule is that the verdict must comprehend the whole issue or issues submitted to the jury in the particular case, otherwise the judgment founded on it will be reversed." *Tompkins v. Carey*, 14 Geo., 116.) The omission of the jury to pass upon the question of property in the plaintiff did not authorize the court to enter judgment in manner and form as entered, viz.: that the defendant be required to pay the plaintiff the *full value* of the property in case the property itself could not be delivered. And because of the error of the clerk of the court (see section 217 of Code of Civil Procedure) in not entering "the judgment in conformity with the verdict," it is the duty of the appellate court to reverse the judgment. The judgment if "in conformity to the verdict" would simply have required the defendant to deliver the possession of the property to the plaintiff and pay him \$75 damages and the costs of suit. The jury not having found that the plaintiff was the owner of the property, the judgment is not in conformity to the verdict in treating him as owner and requiring the defendant in default of delivering the property to pay the plaintiff the full value of the same. The verdict is defective and does not find all the issues for the plaintiff, and if any judgment can be rendered on it, certainly only one, in "conformity with the verdict," which would be defective in not giving the plaintiff the value of his possessory interest in the property in case a delivery thereof could not be had. (*Child v. Child*, 13 Wis., 17; *Warner v. Hunt*, 30 Wis., 200; *Appleton v. Barrett*, 22 Wis., 568; 2 Greenlf. Ev., § 563, and cases there cited; 3 Phillips Ev. in Cowen, Hills, and Eden's notes, side page 491 in note 1076, and cases there cited; *Sprague v. Kneeland*, 12 Wend., 16, and the cases there cited; *Brynton v. Page*, 13 Wend., 425; *Dermot v. Wallach*, 1 Black (U. S.) 96; *Patterson v. U. S.*, 2 Wheat. (U. S.) 221, and cases there referred to; *Garland v. Davis*, 4 How. (U. S.) 131, and cases quoted from in the opinion of the court.) Because



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there may be sufficient evidence in the record to have justified the jury in finding on the issue of property in the plaintiff does not help the matter any. (*Garland v. Davis*, 4 How. (U. S.) 131 and the cases cited in the opinion of the court, especially the case in 11 Wheat.) And this error in the record can be raised for the first time in the appellate court. (*Garland v. Davis*, 4 How., 131, and the cases cited there in the opinion of the court; *Child v. Child*, 13 Wis., 17; *Warner v. Hunt*, 30 Wis., 200; *Appleton v. Barrett*, 22 Wis., 568; 3 Phillips Ev. top page 412, side page 491 in note 1076, and cases there cited; *Brynton v. Page*, 13 Wend., 425, where the case went up on writ of error.) The question of whether the plaintiff was or was not the owner of the property was and is a material issue in this case for the defendant to have disposed of. (*Dermott v. Wallach*, 1 Black (U. S.) 96; *Child v. Child*, 13 Wis., 17; *Warner v. Hunt*, 30 Wis., 200.)

*M. Grigsby*, for appellee.

In replevin, when the taking is illegal, no demand is necessary. (Hilliard on Remedies for Torts, 90, § 52.) Evidence should not be admitted as to the value of the property if the answer does not deny the allegations of the complaint thereon. (Ibid, 93, § 60.) Where the property sued for is a bill, note, bond, or other security for the payment of money, the measure of damages is the amount of the debt of which the paper is the evidence. (Ibid, 670, §§ 1 to 7; Sedgwick on Damages, 609 and 610, and notes; also Civil Code, § 1875.) A new trial will not be granted for the reason that the verdict is not in accordance with the evidence, when there was any evidence in the court below to support the verdict. (18 Wis., 594; 4 Wis., 135.) "So, in Indiana, in a suit to recover personal property, where one defendant claims title and the other disclaims title and possession; a finding, 'that the possession of the property mentioned in the complaint be given to the plaintiff,' is equivalent to finding the property in the plaintiff, and that he is entitled to the possession." (Hilliard on Remedies, 96, cites *Robertson v. Cadwell*, 9 Ind., 514.) Same page: "Where the defendant pleads property in himself and others, repre-

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sentatives of A, property in B, and also property in himself alone, and issues are joined; a verdict on the first plea alone, disregarding the other is sufficient." (Cites *Ramsey v. Waters*, 1 Miss., 406.) "So where the defendant pleaded, 1st, *non cepit*; 2d, an avowry, averring the goods taken to be his property; to which the plaintiff replied, and took issue, etc.; and the jury found a general verdict for the plaintiff on the issue of *non cepit*, without any finding as to the other issue; judgment was given according to the verdict." (Cites *Thompson v. Button*, 14 Johnson, 84.) In the case of *Rouge v. Dawson*, 9 Wis., 246, which was a case in replevin, Judge Dixon, after laying down the rule "that juries must, by their verdicts, respond specifically to all the issues made by the pleadings," and citing authorities to support it, uses this language: "The only exceptions to this rule are in those cases, sometimes found in the books, where there are immaterial as well as material issues joined, and the jury finding upon the latter omit to pass upon the former; and in cases where the verdict in form is only upon one of the issues, but where in finding it they indirectly, though not in terms, pass upon the others. In the first class of cases it is very obvious the determination of the material issues, being alone sufficient to settle the rights of the parties, that the verdict or judgment would not be disturbed. In the latter they are regarded more in the nature of defects in form than substance, and the courts will disregard the omission, or mould the verdict into form, so as to give effect to the intention of the jury; *ut res magis valeat quam pereat*. Of this description are *Hawks v. Crofton*, 2 Burr., 698; *Hodges v. Raymond*, 9 Mass., 316; *Thompson v. Button*, 14 Johnson, 84; and *Hanna v. Mills, et al.*, 21 Wend., 90. From Graham on New Trials I quote the following: "It has long been well settled, that the courts will give validity to verdicts when they perceive the substance of the issue to be contained in the verdict, however rude or informal the finding of the jury may have been expressed. In the language of Ch. J. Hobart, 'the court will work the verdict into form and make it serve.' (Cites Hob. 54, Co. Litt. 227; Burr., 698; 5 Burr., 2662.) For verdicts are to have a reasonable in

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tendment, and to receive a reasonable construction, and are not to be avoided unless from necessity, originating in doubt of their import, or immateriality of the issue found, or their manifest tendency to work injustice." (Cites 6 Com. Pleader, §§ 26, 31, 32 and 33, 1 Chit Arch, 310; Gra. Prac., 534, 536.) To the same effect see Cooley's Blackstone, 2 Vol., 391. In regard to the point as to whether a defect in the form of the verdict can be raised for the first time in Supreme Court I can find no authority except the notes to Voorhies Code. In one of the Wisconsin cases, cited by counsel for appellant, exceptions to the verdict were taken in the court below, but it does not appear in any of the other Wisconsin cases cited how the form of the verdict was brought before the court.

SHANNON, C. J.—The defendant is the appellant. This is an action to recover the possession of personal property under chapter II, title VII, part II of the code of civil procedure, commonly termed replevin. The plaintiff, at the time of issuing the summons, made the requisite affidavit, claiming the immediate delivery of the property. In it he avers that he is now the owner and entitled to the immediate possession of one note and mortgage from William Holt to himself for \$200, at ten per cent. interest, dated January 1, 1874, of the value of \$224; one note given by F. Raymond to him, for \$255, dated Jan. 17, 1874, and due Jan. 17, 1875, bearing interest at the rate of ten per cent., and of the value of \$285.45; a final receiver's receipt issued to him for certain land, fully described, of the value of \$200; one note from C. V. Borth to him, of the value of \$54.60; one pass book containing accounts of sheriff's fees due him, of the value of \$50; a Minnehaha county warrant, No. 13, of the year 1874, of the value of \$20; a Minnehaha county warrant, No. 97, of the year 1873, of the value of \$30; and a warrant of Lincoln county, D. T., worth \$55. The affidavit further shows that said property is wrongfully detained by the defendant, sets forth the alleged cause of the detention, asserts that it has not been taken for a tax, assessment or fine, pursuant to a statute, or seized under an execution or attachment against the property of the plaintiff, and concludes

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by stating the actual value to be \$919.05. The affidavit was regularly indorsed (under section 161) and delivered to the sheriff, who made return that after due and diligent search, he was unable to find the property.

The amended complaint, like the affidavit, alleges the ownership to be in the plaintiff. It declares that on the 9th day of January, of 1875 (the day of the alleged wrongful taking) the plaintiff *was the owner* and lawfully possessed of the said property, and that it was then and ever since has been *his property*. It concludes with the usual demand for judgment against the defendant for the recovery of the possession of the property, or for the sum of nine hundred and nineteen dollars and five cents, the value thereof, in case a delivery cannot be had, together with two hundred dollars damages and costs.

The answer, controverting the material allegations in the complaint, and raising the issues of fact to be tried by the jury, is as follows: First, it admits that the two Minnehaha county warrants were given to the defendant by the plaintiff, and impliedly, of course, that the defendant has them, and detains them; but it alleges that they were given to the defendant as collateral security, to secure a portion of an indebtedness from the plaintiff to the defendant, which indebtedness has not been paid. Here arises a first issue, as to a small portion of the property. Secondly, as to the residue of the property claimed, and upon the direct and material question of its ownership, the defendant answering, says, "that in regard to the plaintiff being the owner of the other goods and chattels, the defendant has not sufficient knowledge or information thereof to form a belief." This, under our statute (section 102 of Code of Civil Procedure) is equivalent to a denial of ownership, or property, in the plaintiff, as to the other property; and it raised a material issue to be passed upon by the jury. Thirdly, the answer further denies that, as to the other property, the defendant has ever had it in his possession—that he has ever taken or detained it—that the plaintiff ever demanded it from him, and finally denies each and every other material allegation in the complaint.

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The issues of fact thus arising in this action, having been duly brought on for trial before a jury, the following verdict was rendered, to-wit: "We, the jury, find that the plaintiff is entitled to the possession of the property, and find its value to be \$650, and assess his damages to be \$75."

There was a motion on the part of the defendant, that the verdict be set aside, for reason of the admission of improper testimony, and that it is against the evidence; which motion having been denied, judgment was entered that the plaintiff recover of the defendant the possession of the personal property described in the complaint, or \$650, in case a delivery of said property cannot be had; and also that he recover seventy-five dollars damages, together with \$8.38 costs. The appeal is from the order denying the motion for a new trial, and from the judgment of the District Court.

In the course of the trial below, the plaintiff having been on the witness-stand and under cross-examination, was asked the following question: "What is the fair market value of 'those notes payable to your order, without your indorsement, in the market at Sioux Falls, at the time this suit 'was commenced?'" To this question the plaintiff's counsel objected, and the objection was sustained by the court; to which ruling the defendant's counsel duly excepted, and this is the first assignment of error.

Before our statute on the subject, in actions of Trover, or for the wrongful conversion of notes, the rule was well understood to be that the amount appearing to be unpaid upon the note, of principal and interest at the time of the conversion, and the interest upon that aggregate from thence to the trial, was *prima facie* the measure of damages. (See *Decker v. Matthews*, 12 N. Y., 313; 7 Porter (Ala.) 466; *Mercer v. Jones*, 3 Camp., 477; *Boans v. Kymor*, 1 Barn. and Adol., 528; *Allen v. Swydam*, 20 Wend., 321, 355.) In 2 Greenleaf on Evidence, section 276, it is said that in Trover, "where the subject is a written security, the damages are usually assessed to the amount of the principal and interest due upon it." (See also *ibid.*, § 649.)

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The defendant had the right to show in reduction, the fact of payment in whole or in part, the inability of the makers to pay wholly or partially, a release of the makers from their undertaking, the invalidity of the note, or other matter which would legitimately affect or diminish its value. (See *Kennedy v. Strong*, 14 J. R., 128; *Cortleyon v. Lansing*, 2 Caines Cas., 199, 215.)

It is not in accord with common observation, that always the value of a note is the amount at which it proclaims itself. Yet it is often so; perhaps more often than otherwise. So, as the rule of damages should be fixed and uniform, the current of the *dicta* of learned judges, from earlier to later times, was to allow the amount for which the note reads to be taken as its *prima facie* value; but to let the defendant be at liberty to show that which affected it and reduced its value. And formerly, in the action of replevin, there were contingencies which would force the same issue—the value of the note. (*Ingals v. Lord*, 1 Cowen, 240; *Tilden v. Brown*, 14 Vermont, 164; 10 M. & W., 576.)

Accordingly our Civil Code, section 1875, properly prescribes that “for the purpose of estimating damages, the value of a thing in action is presumed to be equal to that of the property to which it entitles its owner.” The question in this case was not, therefore, the market value of the notes at Sioux Falls, or other place, at the time the suit was commenced. The legal presumption is that they were worth the amount of principal and interest indicated on their face; and it was incumbent on the defendant to rebut that legal presumption in some of the modes above recognized and well established. There was, consequently, no error in the ruling of the court, upon this point.

The plaintiff having rested his case, defendant's counsel moved for a nonsuit, “on the ground that the property came peaceably into defendant's possession, and no demand had ever been made for the same;” which motion was denied by the court, and defendant duly excepted; and this forms the second assignment of error.

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Upon every principle, the nonsuit was properly refused; but especially upon the ground that a peremptory nonsuit cannot, in this Territory, be ordered against the will of the plaintiff. Marshall, C. J., in the case of *Elmore v. Gryme*, 1 Peters, 469, remarked, "that the court has had the case under consideration, and is of opinion that the Circuit Court had no authority to order a peremptory nonsuit, against the will of the plaintiff. He had a right by law to a trial by jury, and to have had the case submitted to them. He might agree to a nonsuit, but if he did not so choose, the court could not compel him to submit to it."

In the case of *Dewolf v. Rabaud*, also in 1 Peters, 476, Mr. Justice Story, in delivering the opinion of the court, said, that "after the evidence for the plaintiff was closed, the defendant moved for a nonsuit, which motion was overruled. This refusal, certainly, constitutes no ground for reversal in this court. A nonsuit may not be ordered by the court upon the application of the defendant, and cannot, as we have had occasion to decide at the present term, be ordered, in any case, without the consent and acquiescence of the plaintiff." And in *Crane v. The Lessee of Morris*, 6 Peters, 598, the same doctrine is reiterated, and declared not open for controversy.\* (See *Hyde v. Barker*, 1 Pinney, 305; *Baxter v. Payne*, *ibid*, 501.)

\*Since this case was decided, the Supreme Court of the United States has had the question before them, and in the case of *Commissioners of Marion County v. Clark*, 4 Otto, 278, that court lays down the doctrine, that "judges are no longer required to submit a case to the jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury to proceed in finding a verdict in favor of the party introducing such evidence." Citing Law Rep., 4 Exch., 39. They further say: "Decided cases may be found where it is held that, if there is a *scintilla* of evidence in support of a case, the Judge is bound to leave it to the jury; but the modern decisions have established a more reasonable rule, to-wit: that before the evidence is left to the jury, there is or may be in every case a preliminary question for the Judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the burden of proof is imposed." Citing Law Rep., 2 Priv. Council App., 335; *Improvement Co. v. Munson*, 14 Wal., 448; *Pleasants v. Fant*, 22 *ibid*, 120; *Parks v. Ross*, 11 How., 373; *Merchants Bank v. State Bank*, 10 Wall., 637; *Hickman v. Jones*, 9 *ibid*, 201.

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As to the question of damages, the Civil Code, section 1832, provides for actual or compensatory damages to every person who suffers detriment from the unlawful act or omission of another; and such damages may be awarded, in any judicial proceeding, for detriment resulting after the commencement of the action, or certain to result in the future. The damages referred to, in an action to recover the possession of personal property, in section 228 of the Code of Civil Procedure, are actual damages, to wit: for the detention. But this later enactment does not abrogate section 1839 of the Civil Code, (the earlier law) which declares that "in any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud or malice, actual or presumed, the jury, in addition to the actual damages, may give damages for the sake of example, and by way of punishing the defendant."

There was, then, no error in the course of the trial in the District Court. But here, in this court, we have been confronted by an objection, unheard of in any stage of the proceedings below, that it is patent the verdict is so insufficient that no judgment could be rendered upon it.

In *Patterson v. United States*, 2 Wheat., 222, the Supreme Court laid down the principle, that "a verdict is bad, if it varies from the issue in a substantial matter, or if it find only a part of that which is in issue. The reason of the rule is obvious; it results from the nature and the end of the pleading. Whether the jury find a general or a special verdict, it is their duty to decide the very point in issue; and although the court in which the cause is tried may give form to a general finding, so as to make it harmonize with the issue, yet if it appears to that court, or to the appellate court, that the finding is different from the issue, or is confined to a part only of the matter in issue, no judgment can be rendered upon the verdict." This doctrine was again enunciated by that court, in *Downey v. Hicks*, 14 H., 246.

A verdict which finds but part of the issue and says nothing as to the rest, is insufficient because the jury have not tried the whole issue. A special verdict which does not find



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the facts, but only the evidence of them, is imperfect, and no judgment can be rendered thereon, and a *venire de novo* must be awarded. (*Prentice v. Zane's Admr.*, 8 How., 661; *Barnes v. Williams*, 11 Wheat., 416.)

A special verdict is set out in 6 Cranch, 268, *Ches. Ins. Co. v. Stark*; and Marshall, C. J., stating that a certain fact was found defectively, for that reason directed a new trial. The court can render no judgment on an imperfect verdict, or case stated. (*Graham v. Bayne*, 18 How., 60; *Norris v. Jackson*, 9 Wall., 125; 1 Wall., 99.)

In the case before us, the complaint alleges property and right of possession in the plaintiff; the answer traverses directly these allegations. The fact of absolute ownership is maintained by one party and controverted by the other, and the issue thus formed was a material one. For by our statute, where a party claims a delivery of personal property, he must make affidavit to one of two things—either, first, that he is the owner of the property; or, secondly, that he is lawfully entitled to the possession thereof by virtue of a special property therein, the facts in respect to which he shall set forth.

Moreover, the plaintiff, in the complaint itself, avers this absolute ownership, which is denied. In an action for the recovery of specific property, if the property have not been delivered to the plaintiff, as in this case, and the jury desire to render a verdict for the plaintiff, they should say—first, that they find for the plaintiff, or, what is better, that they find a verdict, upon all the issues of fact, for the plaintiff; and then, secondly, they must proceed in addition to do what our law enjoins on them, to-wit: “the jury shall assess the value of the property \* \* \* and may at the same time assess the damages \* \* \* which the prevailing party has sustained by reason of the detention or taking, and withholding such property.” (Code Civ. Pro., 214.)

The following is in New York, the recognized form of a verdict for the plaintiff in an action for chattels, (replevin) to-wit: “This action being brought to trial before a jury, they

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find a verdict, upon all the issues of fact, for the plaintiff, and assess the value of the property at.....dollars, and the plaintiff's damages by reason of the detention of the property at.....dollars." (2 Abbott's N. Y. Forms, 462.)

In 2 Greenleaf on Evidence, section 561, it is said that "where the issue raises the question of title, the plaintiff must prove, that at the time of the caption he had the general or a special property in the goods taken, and the right of immediate and exclusive possession." "If the general issue is simply *non cepit*, that admits the plaintiff's title." (§ 562.) But in section 563, "if the defendant, besides the plea of *non cepit*, also pleads property, either in himself or a stranger, and traverses the right of the plaintiff, the material inquiry will be as to the property of the plaintiff, which the plaintiff must be prepared to prove, the *onus probandi* of this issue being on him; for if the former issue is found for him, but the latter is either not found at all, or is found for the defendant, the plaintiff cannot have judgment."

In *Bemus v. Beckman*, 3 Wend., 667, it was held that if the jury summoned to try such an issue, merely find that the property is not in the defendant, or that it is in a stranger, without finding whether it is or is not in the plaintiff, the verdict will be immaterial, and a judgment on it erroneous. (See 1 Smith's Leading Cases, 405.)

Also in 3 Phillip's on Evidence, 412, note 1076, it is stated that where, besides the plea of *non cepit*, defendant pleads property in a third person, the jury *must* pass upon both issues, otherwise judgment will be reversed. The true character, therefore, of the pleas in replevin, commonly described as pleas of property, in the defendant or in a stranger, is, that of a broad traverse of the property of the plaintiff. (See *Boymton v. Page*, 18 Wend., 425; 12 Wend., 161; 1 Black, (U. S.) 96; *Couch v. Martin*, 3 Blackford, 256; *Huff v. Gilbert*, 4 Blackford, 19; 25 Ark., 183.)

But the case of *Child, et al. v. Child*, in 13 Wis., 17, furnishes a parallel to the one before us. There it was replevin, and the verdict was that the plaintiff was entitled to the possession of the property described in the complaint, and like-

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wise found the value thereof, and assessed the damages for the detention. There, too, the complaint alleged that the plaintiff was the owner of the property which the defendant unlawfully detained, and upon the general plea of "not guilty," the jury found as above, not passing upon the question of title to the property. It was held that the verdict was defective in substance, and a new trial was awarded. Cole, J., in delivering the opinion, said—"when the plaintiff alleges title in himself, that becomes an issue when traversed, and is to be disposed of like any other issue. And the jury might as well ignore the right to the possession, or the wrongful taking and detention, as the title to the property, when the latter fact is in issue."

In *Warner v. Hunt*, 30 Wis., 200, the above view of the law is re-affirmed, declaring the reasonableness and necessity of the rule requiring the verdict to dispose of the question of title, when that is put in issue by the pleadings. (See, also, 20 Wis., 1, *Booth, et al. v. Ableman, et al.*)

The remaining question is this: the judgment being unauthorized, where all the material issues are not disposed of, can the error be urged for the first time in the Supreme Court? Upon principle and authority, we are of opinion that it can. This point came up in *Garland v. Davis*, 4 How., 143, a defect having been discovered in the pleadings and verdict, which was not noticed in the court below, nor even suggested by counsel in the Supreme Court of the United States. That court seems to have had no doubt about their power to consider the defect and to reverse the judgment.

In *Bennett v. Butterworth*, 11 H., 674, Taney, C. J., said—this is "a suit to try a legal title." The plaintiff "claimed in his petition a legal title to the negroes, which the defendant denies," etc. A jury was sworn who found in the following words: "We, the jury, find for the plaintiff twelve hundred dollars the value of the four negro slaves in suit, with six and a quarter cents damages."

"Now," said the Chief Justice, "if anything is settled in proceedings at law when a jury is impanelled to try the facts, it is, that the verdict must find the matter in issue between

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Bond vs. Charleen & Lunn.

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the parties, and the judgment of the court must conform to and follow the verdict. But here the matter in issue was the property in these negroes, and the verdict does not find that they are the property of the plaintiff, or the defendant. \* \* It ought, therefore, to have been set aside upon the motion of either party, as no judgment could lawfully be entered upon it. \* \* \* The judgment is evidently erroneous, and must be reversed. And as these errors are patent upon the record, they are open to revision here, without any motion in arrest of judgment, or exception taken in the district court."

As, therefore, in this case the verdict is defective in substance, the judgment of the District Court is reversed, and a new trial awarded.

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BOND V. CHARLEEN & LUNN.

1. *SHERIFF'S SALE*: MOTION TO SET ASIDE: APPEAL. No appeal lies from the judgment of the District Court on a motion to set aside a sheriff's sale, that not being, within the meaning of the statute, a final order or judgment.
2. ———: ———: ———. The final order is made on motion to confirm the sale, and when a deed is ordered to be executed. Until such order be made the whole question as to the legality of the sale is open, and it may be controverted by all proper parties.

*Appeal from Clay County District Court.*

A judgment having been rendered in the court below against the plaintiff, and in favor of defendants, for costs, execution was issued thereon and certain real estate belonging to plaintiff levied on and sold.

Subsequent to the sale, and before any motion for confirmation was entered, plaintiff moved the court to set aside the sheriff's sale for various irregularities assigned.

This motion was overruled by the court, and plaintiff appeals.

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Bond vs. Charleen & Lunn.

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*E. W. Miller, N. Miner and H. A. Copeland*, for appellant.

*Alex. Hughes*, for appellees.

SHANNON, C. J.—The Code of Civil Procedure, section 10, subdivision 3, provides for an appeal from a *final* order, affecting a substantial right, upon a summary application in an action after judgment; and it evidently contemplates a proceeding founded on the judgment, and assuming its validity. By another statute, approved January 10, 1873, chap. 2, (headed "Amendments and Repeals") section 7, subdivision 4, the *final order*, as to the legality and fairness of the return of the sheriff on any writ of execution, is precedent to the further essential order that the officer make to the purchaser a deed of the lands and tenements sold.

When the return of the execution is presented to the court, the Judge must carefully examine the proceedings of the officer, and must be satisfied that the sale has, in all respects, been made in conformity not merely with the provisions of this statute, but, moreover, with all other laws relating thereto.

How otherwise can he make an order for the execution and delivery of a deed? If prior to, or just immediately before confirmation, a motion be made to set the sale aside for any legal reason affecting the validity of the sale, how can he declare that he is satisfied, until he passes upon all such questions? The final order, therefore, in such cases, would seem to be required to be made when the return is duly presented, and not until then; and the final order is, that a deed be made. Until such order be made, (and in this case it has not been made) the whole question, as to the legality of the sale, is open, and it may be controverted by all proper parties.

The appeal is from an order of the District Court, denying a motion of the plaintiff asking that the execution and sale be set aside. If the Judge in refusing the motion, had added that he was satisfied of the legality of the sale, and had ordered a deed to the purchaser, then, perhaps, it might be

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viewed as such final order in the premises as is appealable.

When the return of the execution shall come before the court, under the statute, then the question as to the necessity of a continuous public advertisement up to the day of actual sale—under a proper construction of the statute on the subject—can properly be raised, together with all other matters touching an examination of the legality and fairness of the sale.

In this case, the land was advertised to be sold on a certain day; but it was not sold on the day thus publicly fixed, but on another day, fourteen days thereafter, during which fourteen days previous to the sale, no advertisement of the day of the sale was upon the court-house door, nor in five other public places; nor was there any advertisement, during that period, in any weekly newspaper.

A statute of Kansas requires, like ours, public notice "for at least thirty days before the day of sale," by advertisement, etc. It was there held that the notice must be continued up to the day of sale. (10 Kan., 170; 12 *ibid*, 492.)

We state the facts as appearing on the record, without, however, pronouncing any opinion thereon, leaving the solution of the point where it, in the first instance, belongs, and remanding it to that proper stage of the proceedings on which it may be raised for final determination by the District Court. (6 Kan., 427.)

In New York, no appeal lies to the general term, from the decision of a motion to open a sale, under a judgment. (*Kingsland v. Bartlett*, 28 Barb., 480; S. C. 8 Abb., 42) Nor from an order setting aside a sale in foreclosure. (*Buffalo Savings Bank v. Newton*, 23 N. Y., 160.)

There was, therefore, no final order in this case from which an appeal can lie to this court, and the appeal is

DISMISSED.

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1	227
2	33
2	70
2	111
2	373
46*	623
2*	259
3*	329
9*	98
47*	780

## DOLK V. BURLEIGH.

1. **PLEADING: DENIAL: SUFFICIENCY.** The answer denies each and every material allegation in the complaint "in manner and form as therein set forth." *Held:*—not a denial of the allegations of the complaint, and is clearly frivolous. *Argu:* The words "in manner and form as therein set forth," qualify the preceding language, so that the denial only refers to the manner and form in which the plaintiff has stated his cause of action, and not to the substance of the allegation in the plaintiff's complaint.
2. —: **UNDER THE CODE: ADMISSIONS.** The object of the Code is to compel the defendant to admit every part of the plaintiff's complaint which he cannot conscientiously deny. *Held:*—that any fact sustaining the plaintiff's case admitted in one part of the answer is to be taken as true, and the plaintiff is not bound to prove it.
3. **FINDINGS OF FACT: ERROR: JUDGMENT.** Where a Judge, in a cause tried to the court, fails to find on all the material issues, it is such error as will invalidate any judgment rendered therein.
4. **PRACTICE: ERROR OF RECORD: FIRST URGED IN SUPREME COURT.** Error in rendering judgment on findings that do not dispose of all the material issues, being error of record to be ascertained from inspection, it may be first urged in the Supreme Court.

*Appeal from Clay County District Court.*

This is an action on a promissory note alleged in the complaint to have been executed by defendant to plaintiff April 2d, 1868. A payment was made on the note May 1st, 1872, and the complaint alleges "that since the date of said payment \* \* \* and prior to the commencement of this suit, plaintiff has lost said note without having indorsed, disposed of or transferred the same." Judgment is asked for the amount due, upon the execution by plaintiff of an indemnity bond. The answer of defendant is in four counts. The first is in the following language: "The above named defendant, Walter A. Burleigh, for answer to the complaint of the above named plaintiff herein, says that he denies each and every material allegation thereof, in manner and form as therein set forth." The second count pleads want of consideration, and the third and fourth are, in substance, statements of counter claims, to which plaintiff replied.

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The plaintiff, subject to any objection which the defendant might thereafter make, read in evidence so much of said Dole's deposition as tended to show the execution and loss of said note, which is as follows:

Witness being examined by John B. Sanborn, Esq., says: I am the plaintiff in this cause. I reside in Washington, D. C.

*Ques.*—State whether or not you have the original note on which this action is brought?

*Ans.*—I have not.

*Ques.*—Where is it?

*Ans.*—Previous to the commencement of this action, I inclosed the original note to the National Bank of Yankton, Dakota. I wrote to the bank that if the note was not paid, it was to be handed to Mr. Pound, my attorney in this case, for collection. It is possible that I sent the note to my attorney direct, and not through the bank. I am not sure about that. I have not seen the note since. I have written to both the bank and Mr. Pound and hear from them that neither of them has received the note. I have made diligent search among my papers, and am certain that the note is not in my possession.

*Ques.*—Have you a copy of the note and indorsements?

*Ans.*—I have.

*Ques.*—Will you furnish a copy to the commissioner?

*Ans.*—I will. This is a copy:

“WASHINGTON, Apr. 2d, 1868.

Six months after date I promise to pay W. P. Dole, or order, nineteen hundred and twenty dollars, for value received.

\$1,920.

(Signed)

W. A. BURLEIGH.

Indorsement: “May 1st, 1872, Rec'd on the within note five hundred dollars.”

*Ques.*—By whom was the indorsement made on the original note?

*Ans.*—Mr. Burleigh, the defendant, made the indorsement himself.

*Ques.*—State whether or not you had ever indorsed this note in blank or otherwise?

*Ans.*—I do not remember that I have ever indorsed it. If I did, it was either to the bank or my attorney with a view to



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collection, their names being specially named in the indorsement. I know I did not indorse in blank. I never do.

\* \* \* \* \*

Plaintiff also introduced his attorney, Wm. Pound, as a witness, who testified that he never received said note from the plaintiff, and the defendant admitted that said note was not received by the First National Bank of Yankton.

Whereupon, the plaintiff offered in evidence what purported to be a copy of said note, set forth in said deposition, to which the defendant objected, on the ground that the evidence in relation to the loss of said note was not sufficient to authorize the introduction of secondary evidence of its contents. The court sustained the objection, and excluded the evidence, to which decision of the court the plaintiff excepted.

Here the plaintiff rested, and the defendant then introduced evidence on his part in relation to the fourth paragraph of his answer as to counter claim, as did the plaintiff in rebuttal, whereupon the court rendered the following decision:

This action being brought to trial before the court, without a jury; a jury having been waived by agreement of the parties in open court, the court finds:

1. The plaintiff, on the 28th day of March, A. D. 1865, at Washington, D. C., executed and delivered the note mentioned in the 4th paragraph of the defendant's answer herein, by which, six months after date thereof the said plaintiff promised to pay the said defendant or order one thousand dollars, for value received, and no part of the same has been paid except the sum of one hundred dollars, which was paid and indorsed thereon on the 14th day of January, 1869.

2. The balance due on said note, and the interest thereon are unpaid.

3. The defendant is the owner of the same.

And the following conclusions of law therefrom:

1. The defendant is entitled to recover of the plaintiff the amount due on said note.

2. Judgment must, therefore, be entered for the defendant to recover of the plaintiff the amount so due, it being one thousand four hundred and five (1405) dollars and his costs.

J. P. KIDDER.

March 17, 1874.

Presiding Judge.

Motion for a new trial was entered before judgment, and overruled, to which plaintiff excepted, and prosecutes his appeal to this court.

*Wm. Pound and J. R. Gamble, for appellant.*

Although the first three paragraphs of the answer of the defendant in the court below are inconsistent with each other,

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and might have been objected to on that account, the execution and delivery of the note as declared on in the complaint are admitted in both the second and third paragraphs. And the plaintiff below should not have been required to introduce any proof whatever, unless it might have been in the way of producing the note for cancellation or accounting to some extent for its destruction or loss. And this proof need not have been so strong, by any means, as though the defendant had rested upon his general denial alone, or had in any way denied that any such obligation had ever existed.

The only necessity for accounting at all for a note like this one is based upon the reasonable security of the payor against its afterwards turning up in the hands of a *bona fide* holder who had received it before due. If transferred after due, the equities of the original parties to the contract would go with it. The note having been made payable to the order of the plaintiff below, the presumption of law was that it so remained. In aid of this presumption, the appellant offered to prove by his deposition that the note was in his possession until long after due, and that it had not been indorsed so that any other person could become its innocent holder.

Under the pleadings, therefore, and upon the failure of the defendant to show a want of consideration, judgment should have been rendered for the plaintiff for the amount claimed, subject to any set-off proven by the defendant and without any indemnity bond being required. In proposing, in his amended complaint, to give such a bond if required by the court, the plaintiff went farther than either law or equity required, unless the note had been payable to bearer, or had been indorsed in blank prior to its loss. (*Pintard v. Lackington*, 10 John., 104, S. C.; *Leading Cases on Bills of Exchange*, 671, and note; *Rowley v. Ball*, 3 Cowen, 803, S. C.; *Leading Cases on Bills*, 680; *Fales, et al. v. Russell, et al.*, 16 Pick., 315, S. C.; *Leading Cases on Bills*, 683, and note.) If the answer below had been a general denial alone and the plaintiff had been properly required to make out his case under that issue, the proof offered in the deposition of Mr. Dole was all that should have been asked for. Conceding

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that the court must be satisfied of the loss of a note before receiving secondary evidence of its contents, still the ruling of the court on this question is subject to review, and will not be approved where it is unreasonable or arbitrary. The story told in this case by Mr. Dole as to sending the note to Yankton for collection was certainly a reasonable one, and no good could come to him from its loss or voluntary destruction. Still, although clearly believing that the note had been lost in the mail, he took the precaution to make diligent search among his papers, and then declared himself satisfied that it was not in his possession.

*G. C. Moody*, for appellee.

The question in this case is an elementary one. To entitle secondary evidence of the contents of a lost instrument to admission, the party "must prove a *bona fide* and *diligent* search has been unsuccessfully made for it in the place where it was most likely to be found." (Greenleaf Ev., Vol. 1, § 558; 2 Cowen & Hill's notes, Phil. on Ev., 441, 475, 469; *Jackson v. Betts*, 9 Cow., 220; *Dan v. Brown*, 4 Cow., 491; *Blades v. Noland*, 12 Wend., 173.) But there can be no necessity for multiplying authorities. It will not be seriously pretended that there was in this case any satisfactory proof of the loss of the note sued upon. The witness states he is not certain whether he sent the note to the bank or Mr. Pound, and does not state how he sent it, whether by mail or private hands. If by mail, whether he deposited it in the postoffice; if by private hands, who it was. He says he made diligent search among his papers, but does not say that the note was even among his papers; where they were kept, where this note was kept, nor where it would likely be if in existence.

And there are other defects certainly showing no compliance with the universal rule before quoted. Under the pleadings the plaintiff could not have recovered, even if the note had been admitted in evidence. He offered no indemnity and plead none. He should have tendered an indemnity and brought it into court. This the law in the absence of a statute required, and this our statute requires. (Civil Code, 1866,

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§ 1754; *Rowley v. Ball*, 3 Cow., 303; *Kirby v. Sisson*, 2 Wend., 550; 1 Abb. Digest, 480, §§ 589, 590; *Desmond v. Rice*, 1 Hilt, 580; *Hough v. Barton*, Vt. 20, 445; *Morgan v. Reintzel*, 7 Cranch, 273; 9 Wheat., 581, 485, 486; 1 Este Pl. & Pr., 584, par. 23; Nash Pl. & Pr., 363, form; 28 Cal., 561; 2 Nev., 47; 24 Iowa, 128, and numerous cases.) Our statute makes no distinction whether the instrument is payable to bearer or order, or whether it is or is not indorsed. The right to require indemnity by a bond signed by the holder and two *sufficient* sureties is given to the maker in case of the loss of *any* negotiable instrument, and this is consistent with the Code of Procedure which authorizes and requires suit to be brought in the name of the owner and holder, whether he obtained it by indorsement and delivery or delivery alone.

BARNES, J.—The first point made by the appellant is that the court below erred in refusing to allow a copy of the alleged lost note or the contents of the note to be given in evidence. That the evidence of the loss was sufficiently established to make this evidence competent, I have no doubt. But I am entirely unable to discover that the plaintiff was prejudiced by its rejection. To properly understand this question we must advert to the pleadings.

The complaint, it will be observed, alleges the making and delivery of the note by the defendant to the plaintiff for a valuable consideration. It also alleges the loss of the note by the plaintiff prior to the commencement of this suit, and at the time of its loss it was not indorsed by the plaintiff.

It is well here to note the fact, that every material allegation of that complaint, not denied, is admitted for all purposes connected with this suit. The logical deduction then is this: if the loss of the note is admitted, not being denied, then the evidence offered of the loss of the note and its contents was merely cumulative, and it will not seriously be insisted that the rejection of cumulative evidence, of a fact admitted upon the record, would be error.

This suggests the inquiry, does the answer controvert any material allegation of the complaint, except the want of con-

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sideration for the note? If not, the plaintiff was entitled to recover without the introduction of any testimony on his part. The want of consideration being a matter of defense.

The respondent claims that the first paragraph of his answer in the words following, is a general denial of every material allegation of the plaintiff's complaint: "The above named defendant, Walter A. Burleigh, for answer to the complaint of the above named plaintiff herein, says that he denies each and every material allegation thereof in manner and form, as therein set forth." This is not a denial of the allegation in the complaint. The words, "in manner and form as therein set forth," qualify the preceding language, so that the denial only refers to the manner and form in which the plaintiff has stated his cause of action, and not to the substance of the allegations in the plaintiff's complaint. This paragraph of the answer is clearly frivolous, and would have been struck out on motion and judgment awarded to the plaintiff upon the pleadings, except that other portions of the answer and the reply present other issues.

An answer which denies that the defendant made the promise in manner and form as alleged in plaintiff's complaint, is but the assertion of a conclusion of law from certain facts. (35 Barber, 298, Tiffany's N. Y. Practice, 373.) "A general denial must be certain and positive." Tiffany then gives the following form: "The defendant denies each and every allegation of the plaintiff's complaint." (Tiffany's N. Y. Practice, 369.)

I am aware there is a conflict of authorities as to whether using the word material in the denial would make the answer frivolous. There are authorities that hold that a denial in the following form is good: "The defendant denies each and every material allegation of plaintiff's complaint." I am unable to find one decision that will uphold or sustain the form of denial used by the pleader in this case.

(12 Wisconsin, 1): A denial in the language of the complaint is not sufficient. It must be of the substance of the allegations of the complaint.

A denial of the indebtedness without denying the alleged

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fact out of which the indebtedness arose, is merely a denial of a legal conclusion. (16 Howard's Term Reports, *Davidson v. Powell*, 467; 18 Wis., 400; 11 Wis., 126.) A denial in an answer in the words of the complaint is not good. It is a negative pregnant with an admission that the alleged facts may have transpired on some other day or under different circumstances. (22 Wis., 412; 21 Wis., 149; 8 Howard's Term Reports, 273.) Under the Code a party may set up as many defenses as he chooses, but he cannot, by making repugnant allegations, compel the plaintiff, in order to avoid a denial in one part of the answer, prove a fact admitted in another. The object of the Code was to compel the defendant to admit every part of the plaintiff's complaint which he could not conscientiously deny. Therefore, any fact sustaining the plaintiff's case admitted in one part of the answer is to be taken as true for all purposes in the case, and the plaintiff is not bound to prove it. In this case the answer is a general denial; second, a justification, and it is held not well pleaded. (*Howard v. Page*, 14 Wis., 49.) Viewed in the light of these authorities, there was no error in rejecting the evidence of the plaintiff of the copy of the note declared on, or its contents.

The second question presented for consideration is this: The second paragraph of defendant's answer alleges, that the note described in plaintiff's complaint was wholly without consideration, thus a material issue is presented for trial. Upon that issue the court below did not find. This is apparent from an inspection of the record.

That this was a material issue there is no question. That the court below omitted to find upon this issue was a fatal error will not be denied if that question is properly here for review. The appellant in support of his position relies upon the decision in the case of *Holt v. Van Eps*, decided at this term of court. That was an action for wrongfully detaining personal property alleged to be the property of the plaintiff.

The detention and ownership of the property were denied by the defendant. The jury found that the property was

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wrongfully withheld, or that the plaintiff was entitled to the possession of the property, but did not find that the plaintiff was the owner of it. The omission to find was discoverable only from an inspection of the record. The court were unanimously of the opinion that the objection was well taken, and a new trial was ordered.

In like manner the error in this case appears from an inspection of the record, and I do not see how it could be presented in any other way. It was suggested upon the argument by appellant's counsel that the attention of the court below should have been called to the necessity of finding upon this issue. But how could this have been done? The respondent could not have known that the court below had neglected to find upon this issue, until judgment was pronounced, and I know of no authority that would justify the court below, after pronouncing judgment, to re-open the case and make an additional finding. That would in legal effect be no less than setting aside the judgment and rendering a different one. It should be observed that there is a material difference between an omission to find upon a material issue and an erroneous finding. The error in the case of omission is ascertained from an inspection of the pleadings and the finding—in the other, from an examination of the pleadings, the finding of the court, the evidence taken upon the trial, and the rulings and decisions of the court during the progress of the trial. In the latter case, therefore, the evidence and decisions of the court must be preserved and brought before the appellate court for review, by a case made or bill of exceptions. I, therefore, come to this conclusion, that such errors as are apparent from an inspection of the record must be determined by that inspection; that such as occur upon the trial, and such as are not apparent upon the record, can only be brought before this court by a case agreed upon, or bill of exceptions. The decision of the court in the case of *Holt v. Van Eps* must control our decision in this case.

In the case of *Thurber v. Jones*, 14 Wis., 16, the Court say: "We are of the opinion that the complaint in this case is clearly insufficient to support the judgment. As there is no

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bill of exceptions of course we cannot look into what purports to be the testimony taken on the assessment of damages. We can only examine and pass upon the errors apparent upon the record. This we have done and find that the complaint does not state facts sufficient to support the judgment."

In the case of *Davidson v. Davidson*, 10 Wis., 86, the Court say: "We do not find in the return made by the clerk of the circuit court any bill of exceptions or case embracing the testimony used upon the trial. And we, therefore, can only consider such errors as are apparent upon the record."

The Court say in 5 Wis., 132: "There being no bill of exceptions in this case we can only notice such errors as appear upon the record."

The counsel for the plaintiff in error contends that the proof in the court below was defective or insufficient to warrant the finding of the court. If the objections had been properly taken and incorporated in a bill of exceptions, we might have considered them. But now it is otherwise.

The judgment of the court below is reversed and a new trial ordered, and the case remanded for further proceedings according to law. All the Judges concurring.

1 236  
2 365  
46\* 461

### TREADWAY V. SCHNAUBER, ET AL.

1. **MUNICIPAL CORPORATIONS: POWERS: DOUBT CONSTRUED.** A municipal corporation possesses, and can exercise, the following powers and none others:

1. Those granted in express words.
2. Those necessarily implied, or necessarily incident to, the powers expressly granted.
3. Those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.

And any fair doubt as to the existence of a power is resolved, by the court, against the corporation and the existence of the power.

2. ———: **AGENTS AND OFFICERS: POWERS AND DUTIES.** Agents and officers of a municipal corporation cannot bind the corporation by any act which tran-



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scends their lawful or legitimate powers. And this rule applies to the issue of negotiable, as well as unnegotiable, evidences of debt.

3. ———: ———: ———. The duties and powers of the officers of a municipal corporation are prescribed by statute, and every person dealing with them as such, may know, and is charged with the knowledge of, the nature of their duties and extent of their powers.
4. ———: ———: ———. There is a broad distinction to be observed between *an irregular exercise of granted power*, and *the total absence or want of power*.
5. **COUNTY: CHARACTER: PURPOSES.** A county is strictly a political corporation—a granted power to a designated portion of the people, to aid and arrange the machinery of government of the whole state or territory. It is not designed for pecuniary profit, nor has it any powers but such as pertain to its strict municipal and public character.
6. **TERRITORIAL LEGISLATURE: SOURCE OF POWER.** The territorial legislature is a creature of Congress; its powers, duties and sessions are defined and limited by the act organizing the territory, and the amendments thereto, and it derives no life or power from any other source.
7. ———: ———: ———. **EXTRA SESSION.** The territorial legislature is authorized to hold a biennial session of not to exceed forty days, and there is no provision empowering any one to call, or the members to meet in extra session, or to extend the session beyond the time specified.
8. ———: ———: ———: **ACTS NULL AND VOID.** The biennial session of the territorial legislature had convened, remained in session during the limit of forty days and adjourned. The members subsequently convened in a so-called extra session, and passed an act authorizing counties and townships to vote aid to railroad companies. *Held:*—that the so-called extra session was unauthorized and illegal, and all its acts and proceedings null and void.
9. **MUNICIPAL BONDS: COMMISSIONERS: RATIFICATION.** The county possessing no power to vote aid to a railroad company, commissioners could not bind the county by issuing what purports to be its bonds; and the county having no authority, originally, to authorize their issuance, it could not ratify the act after it was done. Such bonds are therefore void, even in the hands of an innocent holder, and the collection of tax levied to pay the interest thereon should be perpetually enjoined.

*Appeal from Yankton County District Court.*

It appears from the record that the members of the territorial legislature convened in regular session in the month of December, 1870, and remained in session for full forty days, the limit of time allowed by law. And that subsequently, pursuant to a request therefor, made and issued by the then acting Governor of the Territory, the former members of said legislative body convened in a so-called extra session, and

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passed an act entitled "An act to enable organized counties and townships to vote aid to any railroad and to provide for the payment of the same" Afterwards, to-wit: on the second day of September, 1871, in accordance with the terms of said act, at an election called by the county commissioners, the voters of Yankton county voted to extend the aid of said county to the Dakota Southern Railroad Company, by a donation or gift to the amount of two hundred thousand dollars in the bonds of said county, payable in twenty years, bearing interest at eight per cent. per annum, payable semi-annually. That on the 27th day of May, 1872, the following act passed by Congress was approved, to wit:

An act in relation to the Dakota Southern Railroad Company.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the act passed by the Legislative Assembly of the Territory of Dakota, and approved by the Governor on the twenty-first day of April, eighteen hundred and seventy-one, entitled "an act to enable organized counties and townships to vote aid to any railroad, and to provide for the payment of the same," be and the same is hereby disapproved and annulled, except in so far as is herein otherwise provided. But the passage of this act shall not invalidate or impair the organization of the company heretofore organized for the construction of the Dakota Southern railroad, leading from Sioux City, Iowa, by way of Yankton, the capital of said territory, to the west line of Bon Homme county, or any vote that has been or may be given by the counties of Union, Clay, Yankton and Bon Homme, or any township granting aid to said railroad, or any subscription thereto, or anything authorized by and that may have been done in pursuance of the provisions of the aforesaid act of the Legislative Assembly of said Territory toward the construction and completion of said railroad; and the said Dakota Southern Railroad Company, as organized under and in conformity to the acts of the Legislative Assembly of said Territory, is hereby recognized and

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declared to be a legal and valid corporation; and the provisions of the act of the said Legislative Assembly first aforesaid, so far as the same authorize, and for the purpose of validating any vote of aid and subscriptions to said company for the construction, completion and equipment of the main stem of said railroad, between the termini aforesaid, are hereby declared to be and remain in full force, but no further, and for no other purpose whatsoever.

SEC. 2. That for the purpose of enabling the said Dakota Southern Railroad Company to construct its said road through the public lands between the termini aforesaid, the right of way through the said public lands is hereby granted to said company to the extent of one hundred feet in width on each side of said road: *Provided*, That nothing in this act shall relieve said Dakota Southern Railroad Company from constructing and completing said railroad in accordance with the conditions and stipulations under which the citizens of the counties therein named, voted aid to said railroad in accordance with the laws of said territory, approved April twenty-first, eighteen hundred and seventy-one: *Provided further*, That said Dakota Southern Railroad Company shall issue to the respective counties and townships, voting aid to said railroad, paid up certificates of stock in the same in amounts equal to the sums voted by the respective counties and townships."

During the years 1872 and 1873, the board of county commissioners of Yankton county, acting in behalf of said county, executed, issued and delivered to said railroad company the bonds of said county to the amount of two hundred thousand dollars, bearing interest at the rate of eight per cent. per annum, payable semi-annually, interest represented by coupons attached to the bonds. For the purpose of paying the interest on said bonds, a tax was levied on all the taxable property in said county. Plaintiff brings this action for the purpose of having said railroad tax so levied declared illegal and void, and for an injunction perpetually enjoining the collection thereof.

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To plaintiff's complaint defendants filed a general demurrer, which demurrer was sustained by the court below, and plaintiff appeals.

*Moody & Cramer*, for appellant.

The question for our consideration is: Was there any existing valid law enacted by any competent tribunal which authorized these proceedings, upon which, the levying of this tax was based? If there was not some express authority to incur this debt, and to pay it by taxation, it will not be claimed that the tax was legal or binding, for no one can pretend that the powers here exercised are among the implied powers of a board of county commissioners.

The only law of the Territory upon the subject, is that of the 21st of April, 1871, set forth in the complaint. First, then, what was the effect of the enactment by the Territorial Legislature of the 21st of April, 1871, standing alone, unsupported by the law of Congress? Had it any validity? We need not urge that the powers of the Territorial Legislature are *delegated powers, only*, derived from some law of Congress. If Congress has not authorized the *session*, one cannot be held. If the *subject* of legislation is not within the scope of those "rightful subjects" delegated to the Territorial Legislature, such legislation is without authority.

Section 4 of the Organic Act contains the following proviso: "*Provided*, That no one session (of the Legislative Assembly) shall exceed the term of forty days, except the first, which which may be extended to sixty days, but no longer." (U. S. Statutes at Large, Vol. 12, page 239.) By act of Congress, approved March 3d, 1869, U. S. Statutes at Large, Vol. 15, page 300, it is provided "that hereafter the members of both "branches of the Legislative Assemblies of the several Territories shall be chosen for the term of two years, and the "sessions of the Legislative Assemblies shall be biennial. "And each Territorial Legislature, shall, at its first session "after the passage of this act, make provision by law for "carrying this act into effect."

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The Legislature had been in session full *forty* days in December and January, 1870-71, and could not hold a session again, within two years. Its powers were for that length of time exhausted. The called session, therefore, held on the 21st of April, 1871, was wholly without authority, and its enactments a nullity. At the time, then, of the voting on the 2d of September, 1871, and of the doing of any of the acts that were done, up to the 27th of May, 1872—the time of the passage of the law of Congress—there was no law in existence authorizing the vote, or the doing of any act, toward giving to the railroad company the property of the county, or incurring any indebtedness to aid them, or the raising of any tax, for such a purpose. And so far as this plaintiff is concerned, all was as though nothing had been done or attempted.

We come now to the question: What effect had the law of Congress upon this Legislative enactment, and how far did it extend toward making those acts legal, which before, were without authority of law? (Found in U. S. Statutes at Large, Vol. 17, page 162.) The main object of this law of Congress seems to have been to make of the Dakota Southern Railroad Company a legal and valid corporation—which it was not before—and it will be observed that an impression seemed to prevail, that the act of the Territorial Legislature of April 21, 1871, was the charter of the railroad company, and contained in such charter was the authority to vote aid and subscription to it, by the counties and townships, while upon an examination of such Legislative enactment, it will be seen that it had no reference whatever to such railroad company. The annulling the Legislative enactment, therefore, did not effect the organization of the company in any way, or any subscription to its capital stock.

Congress did not seem to have its attention called to the real facts in the case, as appears not only from the act itself, but from the debates in the Senate upon the bill. (See Congressional Globe, parts 4 and 5, 2d session 42d Congress, pages 2896, 3956, 3762.) The disapproving and annulling of what was already a nullity, neither helped or harmed; and we submit that all that portion of the act which provided that the

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passage of that act shall not invalidate and impair, etc., amounts to nothing. We have only to do with the affirmative legislation therein, which, so far as it affects this case, is contained in these words: "And the said Dakota Southern Railroad Company as organized under and in conformity to the acts of the Legislative Assembly of said Territory, is hereby recognized and declared to be a legal and valid corporation; and the provisions of the act of said Legislative Assembly first aforesaid, so far as the same authorize, and for the purpose of validating any vote of *aid and subscriptions* to said company for the construction, completion and equipment of the main stem of said railroad, *between the termini aforesaid*, are hereby declared to be and remain in full force, *but no further, and for no other purpose whatsoever.*" And also in the concluding proviso of said act, relating to the issuing of *paid up* certificates of stock to the municipalities voting aid. We submit, that the proper rule of construction of this act is one of strictness, in favor of the party whose property is taken from him by taxation, against his will, and given to this corporation.

It will be observed, there is no attempt at validating the vote that had been had, directly, but the act, (which was a nullity) for the purpose of validating a vote of *aid and subscription* to said company, and for that purpose only, was declared to be and remain in full force, and care was taken that it should have no other effect. This was equivalent to saying, that so far as the people had gone, in voting to aid this company, by agreeing to subscribe to its capital stock, and to validate that act alone, they would declare the act of the Legislature of Dakota to be in force, and leave whatever was necessary to carry that agreement into operation, to future legislation.

Now no vote to aid the company *by subscription to its capital stock* had been had. The vote was for a *gift*, or *donation*. There might be a vast difference in the liability of the county, whether it was a gift of so much, and that the end of it—or whether the liability of a stockholder was incurred; for the Incorporation act, under which this company was organized,

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makes the county, in a certain contingency—and that beyond its control—liable for all the debts of the corporation, though its stock was paid in full. (Laws of 1867-8, page 198, § 136.) Therefore the vote, which was actually had, was in no way validated.

Again, supposing the vote had been validated, all the other provisions of the law—those relating to the issue and delivery of the bonds, the payment of interest, the manner of raising, and the authority to raise, the tax, etc., etc.—were not in force, and without some subsequent legislation, the power to carry that vote into effect was wanting. The right to assess more than four mills county tax, and three mills sinking fund, nowhere exists, and that is covered by the other tax levied, exclusive of this railroad tax.

We need not argue, that in the absence of express power to levy a greater tax, and in the face of the prohibitory laws upon that subject, even if the debt was rightfully incurred, the tax to pay it could not be assessed, at least, without the aid of the court.

It will be further observed that this act of Congress refers to a vote of aid and subscription, to a company having its western terminus at the west line of Bon Homme county, while the vote was to favor a road having its western terminus at the city of Yankton, in this county. We venture no vote could have been obtained for a road terminating at the west line of Bon Homme county; and this act, if it amounted to anything, changes the whole contract between those so voting, and the company, and without their consent. But, if the act of Congress is construed as validating the entire act of the Territorial Legislature of April 21, 1871, had Congress the power to impose this burden upon the people of a county for the benefit of a railroad company, with its road and franchises not only extending beyond the limits of the county, but beyond the limits of the Territory? Is this among the powers delegated to the Congress of the United States? These are different questions from those presented where the Legislature of a sovereign state seeks to enact such laws for its own citizens. The question there usually is, has such legislation

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been *inhibited* by the fundamental law? Here the question is, have such powers been *delegated* to Congress? Are they among the *enumerated* powers of the government? (Cooley's Const. Lim., pages 9, 173, and cases there cited; Church J.—Opinion in *People v. Flagg*, 46 N. Y., 405.) We know of no case which has ever arisen in the courts that meets this question fully, and can be cited as a precedent. This seems to be a case of first impression so far as the particular question involved is concerned. This case differs, also, from nearly all the cases decided in the State courts, in that this was a donation, a gift, and not a subscription to the capital stock—a mere exchange of property—or an investment of the public funds in a particular direction.

We are not embarrassed here by the decisions of the courts of the States. They may serve to illustrate the question, but can hardly form, properly, precedents. And as illustrations of what should be the holding of the court, where it is, as now, a question of principle, we submit the better reasoning is found in the following cases and commentaries: (Cooley's Const. Lim., 212–215, and notes; *The People v. Salem*, 20 Mich., 452, (4 Am. 400); *Stokes v. Scott Co.*, 10 Iowa, 166; *State v. Wappello Co.*, 13 Iowa, 388; *Meyers v. Johnson Co.*, 14 Iowa, 47; *Smith v. Henry Co.*, 15 Iowa, 385; *Ten Eyck v. Keokuk*, 15 Iowa, 486; *Clark v. Des Moines*, 19 Iowa, 212; *McClure v. Owen*, 26 Iowa, 243; *Hanson v. Vernon*, 27 Iowa, 28; *People v. Township Board of Salem*, 21 Mich., 11; *Bay City v. State Treas.*, 23 Mich., 499; *Whiting v. Sheboygan R. R.*, 25 Wis., 167; *Phillips v. Albany*, 28 Wis., 357; *Lewis v. Commissioners*, 12 Kansas, 186; *Sweet v. Hulburt*, 51 Barb., 316; *Loan Coms. v. Topeka*, 20 Wall., 655.) And dissenting opinions in many of the cases, where a majority of the Court sustained the validity of the act.

Under what power, conferred by the Constitution, can Congress take the private property of A, and give it to B, whether under the guise of taxation, or otherwise? Congress donates the public lands to railroad corporations. It can dispose of them in its discretion, and does give them, not only to railroad companies, but to private individuals, homesteaders and



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others. But could this plaintiff's property be taken, and given, or disposed of in any way to a homesteader? Congress donates the public moneys! Yes, but they are moneys belonging to the *public*, raised from imposts, or taxation upon the whole people of the United States alike.

Congress may legislate for the territories acquired by conquest or cession, from necessity, "but with powers not exceeding those which Congress itself, by the Constitution, is authorized to exercise over citizens of the United States, in respect to their rights of persons or rights of property." (*Dred Scott v. Sanford*, 19 How., 395, etc.; *Am. Ins. Co. v. Canter*, 1 Pet., 542-3; *U. S. v. Gratiot*, 14 Pet., 537; *Cross v. Harrison*, 16 How., 194.) If Congress possesses the power to pass such an act as this is claimed to be, what is to hinder its authorizing and requiring all the property of all the people of the county to be taken, in the form of taxation, and given to the Northwestern, or Illinois Central railroad, terminating at Sioux City, Iowa, because of some supposed benefit those roads are to the Territory.

The pretense of a vote does not strengthen the authority to impose this tax. If it can be done *with*, no one will deny, it could be done *without*, a vote. If it requires the expression of the will of a majority of the legal voters of the county to make it valid, then the sovereign power of Congress is at an end. And, if so, in this case, when this retroactive law was passed, where is the evidence that a majority of the then residents and property owners consented? If this power exists in Congress, it is simply despotic, nothing less.

In a State the people of one county form a part of that State. They have equally with other citizens a voice in the adoption of the Constitution, by which the legislative power is agreed to be limited, and in the enactment of any law by which they are to be governed. If their property is to be taxed it is because they, in common with the rest of the people of the State, have decreed that it should be. They have had the power and the right to be heard as to its expediency and justness. How is it with the people of a county in a Territory? They have no share in the authority to legislate for

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them; no voice in the making of their Organic law; no power to say whether they shall or shall not be taxed, if this authority thus to legislate is conferred upon Congress.

This is making "needful rules and regulations" with a vengeance. Is it not "taxation without representation?" Can this come within the scope of *needful* rules and regulations? or, is it among the *necessary measures of legislation* for the government of a Territory, temporarily, while it is preparing to take the place to which of right it is entitled, when having sufficient population, and having adopted a Constitution, republican in form, allowing the widest discretion as to what is needful and temporarily necessary?

But I will pursue the discussion of this question no further. I confess my entire inability to do any justice to the subject, and also the embarrassment surrounding it, in view of such an overwhelming mass of legislation, of this character, in the different states, and the seeming support of such *State* legislation by the Supreme Court of the United States; although I know of no case where the courts have gone beyond holding it within the power of the State legislature under their Constitution.

One more suggestion in regard to the extent to which Congress has gone in this law, if it possessed the power thus to legislate. The rule, that "every statute derogatory to the "rights of property, or that takes away the estate of a citizen, is to be strictly construed," is an axiom in the law.

This retroactive enactment, seeking to make that valid which was before a nullity, authorizing this plaintiff's property to be taken by the strong arm of the law, against his will, and given to another without other pretended compensation than a fancied benefit it possibly might be, to him or his property, certainly is entitled to no more liberal construction.

Now, giving it a fair interpretation, no law exists which provides for the *issue* of the bonds—when they shall issue—by whom they shall be executed and delivered—what rate of interest they shall bear—when or where they shall be payable—what rate of tax shall be assessed—by whom collected and

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paid over—the receipt of coupons for taxes—the regulations for the protection of the county. In short, the whole machinery is wanting to carry out the vote validated. And, therefore, it is manifest that Congress only intended to do precisely what they did do, validate a supposed contract between the county and the railroad company, by which the county had subscribed for a certain amount of the stock of the company, and had issued its bonds in payment therefor, whereas the county had done no such thing—had not subscribed for stock nor issued its bonds; but what was done was done by the county commissioners afterwards, without authority of law, and, therefore, their action was *ultra vires* and void.

We have cited no authorities upon the question of the right of this plaintiff to prevent this cloud being put upon his title, because, where, as in this Territory, both the certificate and tax deed are made *prima facie* evidence of the legality of the tax and the proceedings of the officer, the authorities are uniform, and will not be disputed.

*J. R. Gamble*, District Attorney, for appellees.\*

BENNETT, J.—The complainant in this action asks that the defendants, the treasurer of Yankton county and the county of Yankton and its agents, may be perpetually enjoined from collecting a certain tax levied to pay the interest on certain bonds, alleged to have been issued by the commissioners of said county to the Dakota Southern Railroad Company. To the complaint, defendants interpose a general demurrer, which was sustained by the court below, and plaintiff appeals. The questions presented by this appeal involve the validity and legality of the bonds, and the liability of the county of Yankton thereon.

I desire to state without enlarging on them, a few elementary principles, which I regard as underlying the ultimate questions to be determined. A municipal corporation is de-

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\*(The reporter is unable to find among the papers any brief of counsel for appellees.)

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fined to be a public corporation, created by government for political purposes, and having subordinate and local powers of legislation: *e. g.*, a county, town, city, etc. (Bouvier's Law Dic.)

A municipal corporation possesses, and can exercise, the following powers, and none others: First, those granted in express words; second, those necessarily implied, or necessarily incident to the powers expressly granted; third, those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable; and any fair doubt as to the existence of a power, is resolved, by the courts, against the corporation and the existence of the power. (*Vincent v. Nantucket*, 12 Cush., 103; *Clark, Dodge & Co. v. Davenport*, 14 Iowa, 494; *Clark v. Des Moines*, 19 Iowa, 199; *Mintum, v. Larne*, 23 Howard (U. S.) 435; *Bunk v. Chillicothe*, 7 Ohio St., 31; *Sharp v. Spear*, 4 Hill, 76.)

A county is strictly a political corporation—a granted power to a designated portion of the people, to aid and arrange the machinery of government of the whole state or territory. It is not designed for pecuniary profit, nor has it any powers but such as pertain to its strict municipal and public character. (*Jefferson County v. Ford, et. al.*, 4 G. Green, 367.)

Agents and officers of a municipal corporation cannot bind the corporation by any act which transcends their lawful or legitimate powers. And this rule applies to the issue of negotiable as well as unnegotiable evidences of debt. (*Mayor of Albany v. Cunliff*, 2 Coms't, 165; *Hodges v. Buffalo*, 2 Denio, 110; *Boylard v. The Mayor and Aldermen*, 1 Sand'f, 27; *Dill v. Wareman*, 7 Metc, 438; *Vincent v. Nantucket*, supra; *Wood v. Inhabitants of Lyon*, 1 Allen, 108; *Mitchell v. Rockland*, 45 Me., 496; *Western College v. Cleveland*, 12 Ohio, 375; *Commissioners v. Cox*, 6 Ind., 403; *Estep v. Keokuk County*, 18 Iowa, 199; *Clark v. The City of Des Moines*, supra.)

The duties and powers of the officers of a municipal corporation are prescribed by the statute, and every person dealing with them as such, may know, and is charged with the knowledge of the nature of their duties and extent of their powers. (*Delafeld v. State of Illinois*, 2 Hill, 159; *Supervisors v. Bates*,

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17 N. Y., 242; *Butterfield v. Inhabitants of Melrose*, 6 Allen, 187; *Zabriskie v. Cleveland, etc., Railroad Co.*, 28 Howard, 398; *Clark v. The City of Des Moines*, supra.)

We will save ourselves much confusion and unnecessary perplexity by bearing in mind the broad distinction between *an irregular exercise of granted power*, wherein a corporation acts within the range of its general authority, but fails to comply with some formality or regulation it should not have neglected, but which it has chosen to disregard, *and the total absence or want of power*.

The point on which the decision of this case, in my judgment, must turn, as presented by the record, is not as to any irregularities in the exercise of an unquestioned power, but had the county of Yankton, a municipal corporation under the laws of the territory, power and authority to vote aid to the Dakota Southern Railroad Company, and issue its bonds therefor. If so, when and by what act was it conferred? Its existence cannot be presumed; it cannot be inferred as absolutely essential to the declared objects and purposes of county organization and government, which do not include the building of railroads. We can find it only, if it exists at all, in the so-called act of the Territorial Legislature, approved April 21, 1871, and the act of Congress, entitled "An act in relation to the Dakota Southern Railroad Company," approved May 27, 1872. It is not necessary for me to notice the question as to whether the Territorial Legislature or Congress has the power to authorize a municipal corporation of this Territory to vote aid and issue its bonds to a railroad company, but upon the theory that one or both has the power, has it been done in this case?

The Territorial Legislature is a creature of Congress; its powers, duties and sessions are defined and limited by the act organizing the territory, and the amendments thereto, and it derives no life or power from any other source. It is authorized to hold a biennial session of not to exceed forty days, and there is no provision empowering any one to call, or the members to meet in extra session, or to extend the session beyond the time specified.

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This so-called act of the Territorial Legislature was passed at what was termed an extra session of that body, it formerly having convened in regular session, and remained in session during the limit of forty days, when it had adjourned, without day, and ceased to be a legislative body, and the so-called *extra* session was unauthorized and illegal; its acts and proceedings were void, a nullity, and of no more binding force and effect than the resolutions of a town meeting, or the proceedings of a territorial convention. Hence no power whatever was or could be conferred on the county of Yankton by any act that it might undertake or assume to pass. But the act of Congress of May 27, 1872, is claimed to be a curative or legalizing act. "Legalizing a legislative enactment," is a phrase that may strike most persons as strange and anomalous. I need not stop to consider whether Congress might not have legalized the call for, and convening of that body in extra session, and thereby have made it a legal legislature, for this it has not attempted to do. It therefore follows that if it was a self-constituted unauthorized body, possessing no legislative power, no authorized act by competent authority has since changed its character.

It is a general principle, that when an act, proceeding or transaction, is void, and not merely voidable on account of some formal defect, it cannot be cured by legislative action. (Sedgwick on Construction of Statutes, 143, (n.)

As we have seen, the acts of this assumed Territorial Legislature were not merely voidable by reason of some formal defect, but were absolutely void, and I apprehend that Congress does not possess sufficient power, which would have to be something approaching omnipotence, to breathe into them the spirit and life of law. It would be like breathing vitality into airy nothingness—giving form and being to that which in contemplation of law had no existence. But it may be insisted that Congress recognized this as a valid act of the Territorial Legislature. Admit that it did: can Congress by a simple recognition of that as a fact which is a falsehood—as a substance which is even less than a shadow, accomplish that which it could not by positive enactment? The proposition certainly needs no refutation.

But admitting the fullest power on the part of Congress to legalize the act of this illegal body, and to give to it the force and effect of law, the question arises, has it done it? There is no reference whatever in the act of Congress to any illegality in the supposed act of the Territorial Legislature, and no intimation whatever as to any illegality or want of power on the part of the body that passed it, but on the contrary it is treated throughout simply as an ordinary act of a regular Territorial Legislature. This appears more clearly from the very wording of the statute. The first sentence designates it as "the act passed by the Legislative Assembly of the Territory of Dakota," and again "the provisions of the act of said Legislative Assembly," and the first proviso in the section requires said railroad company to construct and complete its road \* \* "in accordance with the laws of said territory, approved April 21, 1871." Then what is the clear and obvious purpose and intent of Congress? Primarily to disapprove and annul that act, but providing that so far as the same authorized, and for the purpose of validating any vote of aid and subscription to the Dakota Southern Railroad Company, said act is declared to be and remain in full force, but no further, and for no other purpose whatsoever. What is that but simply annulling an act recognized to be valid, and saving its application to, and operation in, a particular, specified case? The saving clause was made necessary by the annulling provision.

Congress did not propose that this kind of legislation in a Territory should stand, but did not desire to invalidate acts that had already been done under it, or that might thereafter be done with reference to that one particular project. What is there in this law of Congress that can possibly be construed as legalizing the unauthorized acts of that self-constituted body, or giving to that, the force and effect of law, which before was a mere nullity? I am certainly unable to so construe it, without doing violence to its letter and spirit, and to every known principle of construction. It left that so-called act just where it found it; if it was invalid before, it was invalid after.

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It has been suggested that admitting the Territorial act to be a nullity and in no sense a law, yet the act of Congress is alone sufficient to sustain the validity of the bonds, having conferred the necessary power on the county and authorized their issue. I regard this position as entirely untenable. Will any one pretend that that could have been the intent of Congress, as gathered from the wording of the statute? I think not. And further its provisions are wholly inadequate for so sweeping a purpose. It does not undertake to confer any power or authorize the issuance of bonds; it takes for granted that that had been done, but the supposed act which Congress regarded as having accomplished these purposes, having fallen to the ground, all the provisions in the act of Congress relating thereto must go with it.

I, therefore, conclude that at the date of the transactions alleged in the complaint, no power had ever been conferred, either by Congress or the Territorial Legislature, upon counties or other municipal corporations of this Territory to aid in the construction of any railroad or issue its bonds to any company for that purpose; and in the absence of such grant of power, either express or by clear implication, it did not exist.

There being from this view of the case, as presented by the record, a total want of power on the part of Yankton county to extend, in any manner, aid to a railroad company, it follows that the election held in that county on the second day of September, 1871, at which the question of aiding the Dakota Southern Railroad Company was submitted and voted on, was unauthorized, illegal and a nullity, and all subsequent acts done and performed pursuant to that vote were void. The county possessing no power to contract that kind of an indebtedness, it is clear the commissioners could not bind the county by issuing what purported to be its bonds; and the county having no authority, originally, to authorize their issuance, it could not ratify the act after it was done; they are therefore void, even in the hands of innocent holders, and the collection of the tax levied to pay the interest thereon, should be perpetually enjoined.



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With the question of good or bad faith on the part of the county, and the hardship to the innocent holders of these bonds, I have nothing to do. Were this a case in which the power in the county was unquestioned, and involved only irregularities in its proper exercise, such considerations could be urged with great propriety, and would be entitled to much weight. But that is not the case. It is certainly well that in this early period of the history of our Territorial jurisprudence, the limit of the power of municipal corporations should be carefully defined and guarded. That those who deal with them should understand that they are charged with the knowledge of the nature and extent of the powers and duties of these corporations and their officers; and that they need not expect to go upon the markets and purchase, blindly, what purports to be their bonds and other evidences of indebtedness, issued without authority of law, and find courts of justice ready to enforce their payment, on the ground simply that they are in the hands of innocent holders, and with the mad-dog cry against repudiation of spurious securities, which in contemplation of law, the corporation never issued.

Municipal corporations are the creatures of the statute; they have no powers except such as are conferred; they can do no act unless authorized. And any act done, which transcends their lawful or legitimate powers, or which they are not authorized to do, is simply not the act of the corporation, and there it ends; and against any legal proceedings instituted thereon, it may interpose the plea of *ultra vires*. The sooner these well settled principles are thoroughly understood and acted on, the better it will be, both for the corporations, and those dealing with them.

I desire to notice briefly one other point, which I deem sufficient in itself to warrant my conclusions in this case. Admitting that the act of Congress rendered valid the Territorial act, and legalized all proceedings had thereunder, did it not do more? The pretended Territorial act provided that aid might be extended to any railroad company, in one of three ways: 1st, by donation; 2d, by loan of credit; 3d, by subscription to capital stock. It is alleged in the complaint

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that the voters of Yankton county, voting at the election held September 2, 1871, voted to extend the aid of the county to the Dakota Southern Railroad Company, by a donation or gift to the amount of two hundred thousand dollars, in the bonds of the county. Now the last *proviso* in the second section of the act of Congress, reads as follows: "That said Dakota Southern Railroad Company shall issue to the respective counties and townships, voting aid to said railroad, *paid up certificates of stock* in the same, in amounts equal to the sums voted by the respective counties and townships." This provision clearly requires the company to issue paid up certificates of stock, and as clearly requires the county to receive and accept them, and by implication prohibits the extending of aid to railroad companies, by counties and townships, by way of donation or loan of credit. There is no pretense that Yankton county has ever voted to subscribe to the capital stock of said company. The bonds were issued after the passage of the act of Congress, and it no where appears from the record in this case, that the county has ever assented to the change made in its contract with the company, or ever ratified the acts of its commissioners. If the county can be bound at all it must be in manner provided by the act of April 21, 1871, and the only method therein pointed out, is by the voice of the people expressed through the ballot box; and after it has made its contract, as therein directed, I know of no earthly power that can change it, against the will of the county. It may be said that the change was in the interest of the county, but that matters not; parties to contracts must be the judges as to what is their interest and what not. The county may think very differently on this point. This provision if accepted made the county a stockholder in said company, with all the liabilities and responsibilities which attach under the provisions of the statute of the Territory, under which said company was organized and incorporated, and these may be of such a character that no county would desire or wish to assume them. This Yankton county virtually refused to do by voting aid by way of a gift or donation. There is just one way of escaping the logical

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conclusions to which we are driven, and that is by holding that the people of a county are entitled to no voice in determining the nature, character and amount of the pecuniary liabilities with which they are to be burdened. When that point is reached, despotism will have displaced law, and arbitrary power will make and construe its own decrees.

The judgment of the court below, sustaining the demurrer, is reversed, and the cause remanded.

REVERSED.

SEPARATE OPINION OF ASSOCIATE JUSTICE BARNES: I think the judgment sustaining the demurrer in the court below must be reversed and judgment entered for the plaintiff as demanded in the plaintiff's complaint. I am entirely unable to satisfy myself that Congress has the power to authorize an organized county in a Territory to vote aid to a railroad corporation either by loan of its credit, by donation or by subscription to its capital stock, and then authorize the levy of a tax to pay the interest and ultimately the principal of the bonds issued to said railroad company. I am aware that this class of legislation, when exercised by a sovereign State, has been upheld both by the State and Federal courts.

From an examination of the authorities bearing on this question, it will be found that the decisions are based upon the fact that the State being sovereign there is no limit to the power of taxation, except only that the tax must be intended for a public purpose, and except that the taxation must not be so enormous as substantially to amount to confiscation.

The sovereign State possessing this power of taxation, it is held that the question of the issuance of bonds, and the levy of a tax, may properly be submitted to the electors of the town, county or municipality particularly interested in the proposed public improvements. (See *Bridgeport v. Railroad Company*, 15 Con., 475; 21 Penn. St., 148; *Railroad Company v. Clinton County*, 1 Ohio St., 77; *Ryder v. Railroad Company*, 13 Ills., 516; *Radfield on Railways*, 534; 10 Wis., 195 and 271; *Whitting v. Sheboygan & Fon du Lac Railroad Company*, 25 Wis., 167, and the numerous cases therein cited.)

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The taxing power of a sovereign State, except as limited by the State or United States constitution, is limited in extent only by the will of the government itself. No limitation or restriction upon the exercise of this power can be raised by implication, but the intention to limit or abridge must be expressed in clear and unambiguous language. (Cooley on Taxation, 68; 7 Wall, 71.)

All definitions of taxation imply that it is to be imposed only for public purposes, and whatever difference of opinion may exist regarding the admissibility of taxation in particular cases, the fundamental requirement that the purpose shall be public will be conceded on all sides.

And upon an examination of the authorities above referred to, it will be seen, the unlimited and sovereign power of a State to levy tax for all public purposes, is conceded; but the troublesome question has been to find some substantial reason for holding that railroad corporations, owned by private persons, controlled and managed in the interest of private parties, were public improvements of that kind that authorizes the exercise of the taxing power of the State in taking the private property of individuals to aid in their construction.

I will not comment upon the serpentine process of reasoning by which this extraordinary taxation is upheld. It is sufficient to say this legislation is sustained by the courts, because not forbidden by State constitutions.

We now examine the Constitution of the United States, not to ascertain whether this class of legislation by Congress is prohibited by that Constitution, but to ascertain whether this power is expressly conferred by the people or the States, upon the general government; or, is this highest and sovereign power of extraordinary taxation plainly implied from any specific grant of power to the general government. Cooley on Constitutional Limitations, page 173, says: "The government of the United States is one of enumerated powers; the governments of the several States are possessed of all general powers of legislation." When a law of Congress is assailed as void, we look in the National Constitution to see if the grant of specified power is broad enough to embrace it; but when

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a State law is attacked on the same ground it is presumably valid in any case, and this presumption is a conclusive one, unless in the Constitution of the United States or of the State we are able to discover that it is prohibited. We look in the Constitution of the United States for grants of legislative power, but in the Constitution of the State to ascertain if any limitations have been imposed upon the complete power with which the legislative department of the State was vested in its creation. Congress can pass no laws but such as the Constitution authorizes, either expressly or by clear implication. While the State legislature has jurisdiction of all subjects on which its legislation is not prohibited.

The law-making power of the State recognizes no restraints, and is bound by none, except such as are imposed by the Constitution. (See 15 N. Y., 333; 27 Barber, 593; 4 Mich., 244; 17 Penn. St., 119; 52 Penn., 477; 17 Cal., 547.)

There must be distinct legislative authority for every tax that is levied. This is a principal that admits of no exception whatever. (Cooley on Taxation, 242; *Morris v. Russell*, 5 Cal., 449; 44 Ills., 85.)

Subdivision 3 of Article 4, of the Constitution of the United States, contains this provision: "The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States."

Section 2, Article 2, contains this provision: "The President shall have power by and with the consent of the Senate to make treaties, provided two-thirds of the Senators present concur."

Section 8, Article 1, contains this provision: "That Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense, and general welfare of the United States; but all duties, imposts and excises shall be uniform throughout the United States."

The foregoing is the only express grant of power to Congress, to levy and collect taxes, and I think it will not be claimed that this provision of the Constitution would authorize the levy

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of a special tax to aid in the building of a railroad, should the same be voted by the electors in one of the organized counties in an organized Territory.

While there may be a question whether the provision of section 3, of article 4, above referred to applies to territory acquired by treaty, subsequent to the adoption of the Constitution, I do not think it necessary to inquire. That the territories of the United States belong to the people of the United States, is a proposition so plain that no argument in support of it is necessary.

The general government hold these territories of the United States, whether acquired by treaty or otherwise, in trust for the people, whom the general government represent and act for, just so far as the general government is expressly or by clear and unmistakable implication authorized to represent the will and protect the interests of the people. Here, then, is sufficient power to authorize Congress to provide a territorial government for the people of the Territory, with usual and ordinary powers of legislation, not exceeding the powers delegated by the people to Congress. Congress acting in the interest of the people, has the power to prescribe needful rules and regulations for the government and settlement of the territories, and the disposition of the public lands in these territories. These territories are governed and must be governed in the interest and for the benefit of the sovereign people. Acting upon this authority, public lands have been surveyed, sold and conveyed to private persons. The purchasers and owners of these lands are entitled to the same protection, and hold substantially the same relation to the taxing power, that they would if these lands were embraced within the boundaries of a sovereign State. These lands have been sold by the government, representing the people, and the government has no more interest in or control over these conveyed lands than the lands of any individual in a State; and I am entirely unable to discover any theory upon which we can uphold the law of Congress authorizing the electors of Yankton county to vote aid by subscription, or otherwise, to aid in the building of the Southern Dakota railroad, and

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authorize the levy of a tax to pay the subscription, unless we are prepared to go to the full extent of holding, that the government of the United States is not a government possessing no powers except such as are delegated or granted by the people or the States, but is in fact a government of unlimited and sovereign power; and because a government of unlimited and sovereign power, may authorize the taking of private property to aid in any and all public enterprises, without limit or restriction, so long as the tax is not so excessive as to amount to confiscation.

It is well to observe here that this law of Congress in no way acts upon, or affects, the public lands in this same county. This is not general legislation for the people of the United States, nor is it legislation with reference to the property or rights of the United States, nor is it general legislation in the interest of the Territory of Dakota. It is a class of legislation that has greatly troubled legislators and courts, properly to name or define. It is legislation authorizing the taking of private property of taxpayers in certain counties, and delivering it over to a corporation to expend in the building of a railroad owned by private parties, exclusively, the use of which the public may enjoy by paying full compensation. This is the exercise of the highest and probably the most dangerous sovereign power, only upheld where there is no limit upon the taxing power, except that the purpose shall be public. It is reversing the order of Congressional legislation as heretofore exercised.

Congress has made frequent grants of public lands, and in various ways aided in the construction of railroads through public lands in the territories, and thus benefiting citizens settling upon these lands; but in this instance Congress is attempting to place this burden upon private parties, and thus enhance the value of public lands in these same counties. By this process, and if this kind of taxation can be sustained, a burden before unheard of can be forced upon the pioneers who happen to be so unfortunate as to have purchased government lands. The evils resulting from this kind of legislation in the States have been so great that I regard it fortunate

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that Congress has not the power to repeat it in the territories. It requires very little discernment to see that long before the new States could be admitted into the Union, almost every organized county would be bonded to such an extent, in their efforts to procure the building of railroads, that the payment of their bonds would be an utter impossibility. For the purpose of examining the questions presented in this case, and that only, I will now assume that Congress has the power, and that a Territorial Legislature has the power, to authorize a town or county to vote aid to a railroad company; that being so, was there any authority for the vote of aid in this case? Was there any law authorizing the vote, or authorizing the subscription? It is conceded, upon the argument, that the pretended act of the pretended Legislature, approved April 21, 1871, was absolutely void, and the only force or validity now claimed for it, is the validity given to it by an act of Congress, approved May 27, 1872, about eleven months after the passage of the pretended Territorial act. It is admitted that the only vote taken, to determine the wish of Yankton county, was the vote of September 2d, 1871, some six months before the passage of the law by Congress, attempting to validate the vote of aid to the railroad company. It is conceded likewise that at the time of taking the vote there was no law authorizing it to be done.

Here, then, we have to meet the distinct question: can a legislative body pass a retroactive law, and thus make valid that which before was void, that which before had no legal existence? I think not. If the law of Congress of May 27, 1872, made valid the vote of September 2d, 1871, then Congress could make valid the subscription of Yankton county, without submitting the question to the voters of that county at any time. The board of county commissioners had no authority to make an order for holding the election. They had no authority, nor had any official in the county, to receive a vote or certify the result. There was no authority to administer an oath to a voter challenged; in fact, every act pertaining to the taking of that vote, was without authority and void. And if a proceeding of this kind can be upheld, it will



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be going but a little farther to sustain a subscription without law and without even an attempt to ascertain the wishes of the voters on the question.

In the case of *Hasbrouck v. The City of Milwaukee*, the city authorities were authorized to make a contract for the improvement of the harbor of Milwaukee, at a sum not exceeding \$50,000, to be paid by the issuance of the bonds of the city for that sum; the bonds not to be issued unless a majority of the electors should vote for the contemplated harbor improvement. The voters of the city declared in favor of the improvement, and the work was put under contract. The contract was first made with one Howley, by him assigned to Barton, and after the decease of Barton, by his representatives, to the plaintiff. By subsequent legislation the voters of the city were authorized to increase the amount to \$100,000. The contract was changed from time to time, which added materially to the expense, till at the time of its completion by the plaintiff, the amount claimed by the plaintiff was \$70,000 in excess of the amount that the city was authorized to pay, by the various acts of the Legislature as sanctioned by a vote of the taxpayers. Subsequent to the completion of the contract the Legislature passed a law making the contract valid for the full amount, and authorizing the city to pay such sum as the plaintiff claimed over and above the amount the city was authorized to expend for the improvement of the harbor. The city authorities refused to pay any sum whatever in excess of the amount to which they were limited by the former acts of the legislature; in other words, they refused to recognize the validity of this retroactive law of the legislature. The right of the plaintiff to recover depended upon the validity of this retroactive law. The opinion of the court is by Dickson, Chief Justice. The Court say: "It is claimed by the plaintiff, that if under the two previous statutes the city was only authorized to enter into a contract for the construction of a harbor, the expense of which should not exceed \$100,000, and that the municipal authorities were not at the time they attempted to do so, empowered to make an agreement or bind the corporation for the payment of a

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greater sum, the defect is cured by the operation of the act of February 23, 1857, and that from and after the passage of this act the agreement for the excess became valid and binding upon the city. In the first place it will be observed and should be borne in mind, that the subject with which we are dealing is not one of public policy merely, but of corporate power, and that the inquiry, where the supposed contract of a public corporation is absolutely void for want of capacity to enter into it, a subsequent legislative ratification or recognition of it, is sufficient, without any evidence, that such ratification was procured at the instance, or with the intent on the part of the city, to give such contract life and vitality, could make it obligatory upon the corporation. I do not understand that the city, by any appropriate action, petitioned or asked for the passage of this act. On the contrary, I infer from this proceeding, that it has refused to be bound by it. Under these circumstances the question is, can the Legislature, by recognizing the existence of a previous void contract, and authorizing its discharge by the city, or in any other way, force the city into a performance of it? It follows, from what I have already said, that in my opinion, it cannot. This is not a defect which can be reached by the retroactive power of the Legislature. It cannot, because, in so doing, the Legislature would interfere with vested or fixed rights. It would, of its own mere motion, create an obligation, where, by law, none before existed. It would impose a liability against the will, and without the consent of the party, to be charged thereby. This the Legislature cannot do. It can only act retrospectively for the purpose of furnishing a remedy for the removing an impediment in the way of the enforcement of some pre-existing legal or equitable right or duty, and not for the purpose of creating such right or duty. And this distinction will be found to prevail in all the cases."

(See 23 Wis., 362): This action is to recover bounty money, alleged to have been voted by the defendant, the town of Liberty, in 1864, for volunteers and drafted men. The complaint also set forth a special act of the Legislature of 1866, legalizing the proceedings of said town taken in 1864, and authorizing the

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levy of a tax to pay the bounties then voted, at the rate of \$200 for each person drafted. The defendant demurred. The demurrer was overruled and defendant appealed. Dickson, Chief Justice: "The order overruling the demurrer must be reversed for the reason that at the time the town meeting was held and the vote taken, there was no law authorizing the towns of this State to raise money by taxation to pay bounties to drafted men. The statutes then in force only authorized the payment of bounties to volunteers, and the raising of money for the purpose of giving aid to the families of volunteers and drafted men. The raising of money to be paid to drafted men, as bounties, or in consideration of these entering the military service, was not authorized by any act of the Legislature. This being so, it is clear that the voters or inhabitants of the town could levy no tax for the purpose of raising money to be paid to drafted men; and if they could not levy a tax, it is equally clear that they could not make a promise or enter into a contract binding a town to such payment—the vote was simply null and void, and being so there existed no obligation on the part of the town to pay the plaintiff and those whose claims he represented, who were drafted men prior to the passage of the act of March 21, 1866. Does that act help the case of the plaintiff? We shall enter no argument to show that if there was no obligation on the part of the town, before the passage of the act, the Legislature could not, without the concurrence of the inhabitants, or proper authorities of the town, originate one upon which an action at law, as upon a promise, may be maintained against the town. If the act be valid for any purpose, and we do not desire it to be invalid, and if the plaintiff has a remedy under it, it must be by some proceeding, to compel the levy and collection of the tax. By an examination of chapter 142, Local Laws of 1866, it will be seen that it first legalizes the proceedings of the town meeting, for the purpose of paying bounties to volunteers and drafted men—and that law further provides for the levy and collection of a tax to pay drafted men and volunteers in the military service; and, therefore, while the court holds that the Legislature could not validate

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the void law, it may well be questioned whether the provision was not broad enough to compel the town authorities, in a proper proceeding, to levy and collect the tax to discharge this moral and equitable liability of the town to the drafted men and volunteers."

In discussing this question of retroactive legislation, a very marked distinction must be kept in mind between that class of legislation which cures defects, and legislation validating void proceedings; whether the purpose to be accomplished is the collection of ordinary revenues for the support of government, or ordinary taxes for municipal purposes, which do not require a vote of the taxpayers, or electors, to authorize the levy of the tax, and retroactive legislation to validate void proceedings, which were unauthorized in the first instance, unless sanctioned by vote of the electors.

I think the decisions are uniform in holding that the payment of ordinary taxes for the support of government, whether State or local municipalities, is one of the most sacred duties devolving upon the taxpayer. He is protected in every respect by the State, and in return for this protection he has pledged his all for the support of that government which protects him. And if the law which authorizes the collection of the proper tax or revenue, is void, and is so declared by the courts, a fresh or subsequent law may be passed by the Legislature, retroactive in its terms, validating the invalid proceedings, and thus furnishing the means or process for collecting that tax which the taxpayer was under the most sacred obligation to have paid. And I think the decisions are just as uniform that a legislative body cannot pass a retroactive law, validating void proceedings against the will of the voters and taxpayers, which alone was authorized to make the act valid in the first instance.

Taxation in the case at bar, is taxation in a special proceeding and that for which a special enabling act was required, and not taxation for purely public purposes over which this unlimited power of legislation prevails. It is a species of taxation which it has been held the Legislature may authorize, subject to the ratification or consent of the

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proper local authorities, or of the people of the particular municipality, but not without such ratification or consent.

In 58 Maine, 597, the Chief Justice says: "It requires the contract or "consensual act" of such local authorities, or of the people, to give it validity and effect."

(See *Mills v. Charlton County Treas.*, 29 Wis., 400): If the Legislature in the first instance has no compulsory power of taxation for the purpose indicated, and can only by proper enabling act, submit the matter to the action of the local officers or the people of the municipality, it would seem to follow that it has no power to cure defects, or to waive, or supply omissions in past proceedings, against the will of the party to be charged. Dixon, Chief Justice, says "the Legislature may, in its discretion, authorize a minor to mortgage his land in a particular manner, and for a particular purpose, but if in the supposed execution of the power, the minor should proceed in a different way, or to mortgage for a different purpose, the instrument would be void. Could the Legislature by retroactive measures obviate the defect and declare that a valid contract, which before was void, against the will of the person whose estate was to be charged? This Court is of the opinion that it could not."

(See *Orton v. U: S. Neunon*, 23 Wis., 102): In this case the action was to recover the possession of a piece of land conveyed by a tax deed to the plaintiff. It appears that the land was not properly described in the tax deed. The Legislature passes a law for the purpose of curing the defect, and making valid the deed. The Court say, "the act has no influence upon the question, for the reason that the Legislature has, under the Constitution, no power to declare a deed valid which by law was void at the time of the passage of the act."

It was suggested upon the argument that the commissioners in issuing the bonds to the railroad company might have sanctioned, approved or assented to, the validating act of Congress. I do not think any act of theirs could have that effect, for the reason that it was not the assent of the commissioners that was necessary to authorize the issuing of the bonds, but the express assent of a majority of the electors

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was necessary. The retroactive law validating an invalid law, before it can become operative and binding, must be accepted and sanctioned by the same party or persons, whose assent was necessary in the first instance.

It will be observed that in the discussion of the questions presented in this case thus far, I have assumed that, notwithstanding general powers of legislation are, by the Organic act, conferred upon the Territorial Legislature, yet Congress still retains the right, and may at will, legislate for the Territory. Of the soundness of this proposition, however, I have grave doubt. Congress may make all needful rules and regulations for the government of the Territories, and Congress acting under this authority has given to the Territory of Dakota an Organic act. And it is aptly and well said by Chief Justice Miller: "The Organic act of a Territory is its Constitution. Congress having given to the Territory its charter or Constitution, by the provisions of which general powers of legislation are conferred upon the Territorial Legislature, is not the power of Congress to legislate for the Territory at an end? or may Congress and the Territorial Legislature, each, in its own way and time, legislate for the Territory? If Congress may still legislate for the Territory as to important matter, then it may as to trivial or unimportant matters. If it may grant charters to railroad corporations, or authorize municipalities to make donations to railroad companies in the Territory, it may grant city and village charters. It may provide criminal or civil codes and regulate all commercial transactions. It is unnecessary, however, to discuss this question, and we do not now undertake to decide it."

It will be inferred from what I have said that in my opinion a Territorial Legislature cannot authorize a county, by a vote of the taxpayers, to aid in the building of a railroad, and then levy a tax upon the taxable property in the county to raise money to discharge that liability. This power rests only with the Legislature of a sovereign State, whereby the fundamental law of the State, which springs directly from the will of a sovereign people, is unlimited and unrestricted as to this kind of legislation. The legislative power in a Territory

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is not brought into existence by the authority or will of a sovereign people. Its life, power and perpetuity are subject to the will of Congress. When the population in a Territory is sufficient to entitle it to representation in Congress, and to justify the formation and organization of a new State, then the sovereign people act, and in their sovereign capacity take the necessary action for the formation of a State constitution; the people then limit the legislative power or not, as they deem most wise.

In examining a law passed by a Territorial Legislature we are governed by the same rules that apply to the examination of an act of Congress, that is to say, we must ascertain whether the power has been delegated or granted to the Territorial Legislature to enact the law under consideration. Tested by the rules above indicated I come to the conclusion that neither Congress nor the Territorial Legislature, nor both combined, could authorize or empower the county of Yankton to make the donation or subscription to the capital stock of a railroad corporation. I will repeat as in substance I have before remarked—the Organic act of a Territory is its Constitution. This Constitution provides for one session of forty days, and no longer, biennially. A session of the Legislature extending beyond this limit, is not only not authorized but it is in violation an disregard of the fundamental and supreme law of the Territory.

**CHIEF JUSTICE SHANNON, DISSENTING:** The complaint alleges the illegality and invalidity of a tax, designated as "the railroad tax," levied to pay the interest on bonds to the amount of two hundred thousand dollars, issued by the commissioners of the county and delivered to the Dakota Southern Railroad Company.

The said bonds were issued and delivered in pursuance of the following: first, of an act of the Territorial Assembly, passed at an extra session, on April 21, 1871, the illegality of which session is asserted; secondly, of an election held in September following, at which a majority of those then voting, voted to extend the aid of the county to the said railroad, by

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a donation to the amount aforesaid, in bonds of the county, payable in twenty years, with interest; and, thirdly, of an act of Congress, approved May 27, 1872, entitled "An act in relation to the Dakota Southern Railroad Company," which validated the provisions of the Territorial act, so far as the same authorized any vote of aid and subscription to said railroad.

In his complaint the plaintiff prays that said railroad tax, levied on his property, may be declared illegal and void, and that the county and its agents may be perpetually enjoined from proceeding to collect such tax.

The defendants demurred to the complaint, for that it "does not state facts sufficient to constitute a cause of action."

The court below sustained the demurrer, and gave judgment that the complaint be dismissed. The plaintiff appealed.

By the Organic law of the Territory, of March 2, 1861, it was declared that the legislative power shall extend to all rightful *subjects* of legislation consistent with the Constitution of the United States and the provisions of that act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of non-residents be taxed higher than the lands or other property of residents; nor shall any law be passed impairing the rights of private property; nor shall any discrimination be made in taxing different kinds of property; but all property subject to taxation shall be in proportion to the value of the property taxed.

This law was formed upon the model of the famous ordinance of Congress of the 13th of July, 1787, which has ever since constituted, in most respects, the model of all our territorial governments.

On the 6th of January, 1868, the Legislative Assembly of this Territory at a regular and lawful session, passed a general incorporation act, entitled "An act to regulate incorporations," which, among other things, provided for the incorporation of railroad companies. Under it, the Dakota South-



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ern Railroad Company, in or about April, 1871, became organized, for the construction of a railroad from Sioux City, Iowa, to the city of Yankton, the capital of this Territory.

On the 21st of April, 1871, the Governor of the Territory approved an act, entitled "An act to enable organized counties and townships to vote aid to any railroad, and to provide for the payment of the same."

In the following autumn, to-wit: on the 2d day of September, 1871, in pursuance of said last enactment, at an election then held, a majority of the voters of Yankton county voting on that day, decided to grant a donation of two hundred thousand dollars to aid the said railroad company, in bonds of said county, payable in twenty years, bearing eight per cent. interest, the interest payable semi-annually. But doubts arose as to the above legislation.

In the first place, although the Organic act had conferred on the assembly legislative power co-extensive with all rightful subjects of legislation, not inconsistent with the Constitution and that act, yet Congress on March 2, 1867, enacted that the Legislative Assemblies of the several Territories shall not grant private charters or especial privileges, with the exception, however, that they may, by general incorporation acts, permit persons to associate themselves together *as bodies corporate, for mining, manufacturing, and other industrial pursuits.*

This last named act of Congress created the doubt as to the validity of the Territorial act of January 6, 1868, in relation to the incorporation of railway companies.

In the next place, the validity of the Territorial act of April 21, 1871, was questioned. The regular session of the Assembly was over. It had convened on the 5th of December, 1870, and had concluded its allotted term of forty days on the 13th of January, 1871. The members of that regular session had been chosen for the term of two years, and the sessions could only be biennial. The session in April was an extraordinary one; it had been called by a proclamation of the acting Governor; and his right to do so was doubted or denied.

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In this juncture of affairs, Congress was appealed to, and its power invoked to ratify transactions performed under color of the said Territorial enactments. In other words, Congress was asked to make a law to cure all defects of power in said enactments passed by the direct or reputed representatives of the people, and to heal all irregularities.

Accordingly, Congress on May 27, 1872, enacted a law, entitled—

“An act in relation to the Dakota Southern Railroad Company.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the act passed by the Legislative Assembly of the Territory of Dakota, and approved by the Governor on the twenty-first day of April, eighteen hundred and seventy-one, entitled “an act to enable organized counties and townships to vote aid to any railroad, and to provide for the payment of the same,” be and the same is hereby disapproved and annulled, except in so far as is herein otherwise provided. But the passage of this act shall not invalidate or impair the organization of the company heretofore organized for the construction of the Dakota Southern railroad, leading from Sioux City, Iowa, by way of Yankton, the capital of said Territory, to the west line of Bon Homme county, or any vote that has been or may be given by the counties of Union, Clay, Yankton and Bon Homme, or any township granting aid to said railroad, or any subscription thereto, or anything authorized by and that may have been done in pursuance of the provisions of the aforesaid act of the Legislative Assembly of said Territory toward the construction and completion of said railroad; and the said Dakota Southern Railroad Company, as organized under and in conformity to the acts of the Legislative Assembly of said Territory, is hereby recognized and declared to be a legal and valid corporation; and the provisions of the act of the said Legislative Assembly first aforesaid, so far as the same authorize, and for the purpose of validating any vote of aid and subscriptions to said company for the construction, completion and equipment of the main

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stem of said railroad, between the termini aforesaid, are hereby declared to be and remain in full force, but no further, and for no other purpose whatsoever.

SEC. 2. That for the purpose of enabling the said Dakota Southern Railroad Company to construct its said road through the public lands between the termini aforesaid, the right of way through the said public lands is hereby granted to said company to the extent of one hundred feet in width on each side of said road: *Provided*, That nothing in this act shall relieve said Dakota Southern Railroad Company from constructing and completing said railroad in accordance with the conditions and stipulations under which the citizens of the counties therein named, voted aid to said railroad in accordance with the laws of said Territory, approved April twenty-first, eighteen hundred and seventy-one: *Provided further*, That said Dakota Southern Railroad Company shall issue to the respective counties and townships, voting aid to said railroad, paid up certificates of stock in the same in amounts equal to the sums voted by the respective counties and townships."

Very shortly thereafter, to-wit: on the 10th day of June, 1872, it passed another curative act, as follows: "That the "first section of an act, approved March 2d, 1867, entitled "An act amendatory of 'An act to provide a temporary government for the Territory of Montana,' approved May 26, 1864, so far as relates to *incorporations which have been*, or which may hereafter be, created and organized for the business of mining, manufacturing, or other industrial pursuits, or the construction or operation of railroads, wagon roads, irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any benevolent, charitable, or scientific association, and for all rightful subjects of legislation consistent with the Constitution of the United States, under the general incorporation laws of any Territory of the United States, *shall be construed as having authorized*, and as authorizing the Legislative Assemblies of the Territories of the United States, *by general* incorporation acts, to permit persons

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to associate together as bodies corporate for purposes above named."

After the passage of these acts of Congress, *i. e.*, on the first day of July, 1872, the board of county commissioners of Yankton county, acting in behalf of the county, executed bonds of the county to the amount of two hundred thousand dollars, payable twenty years after that date, bearing interest at the rate of eight per cent. per annum, payable semi-annually, and which interest is represented by coupons attached to the bonds, which bonds were afterwards, and during that year, and the year 1873, issued and delivered to the railroad company, in pursuance of the said disputed Territorial enactment of April 21, 1871, and of the said legislation by Congress.

It is no where alleged that the election held on the second day of September, 1871, was not held or conducted in the manner, and according to the directions, prescribed in the enactment of April 21, 1871. There is no charge of unfairness, or fraud, as respects the election. It is admitted that a majority of the electors, voting at said election, did vote to extend the aid of the county, to that railroad company, by a donation, or gift, to the said amount, and that the bonds of the county should be issued therefor, the principal to be payable in twenty years, and the interest of eight per cent. payable semi-annually.

The enactment of April 21, 1871, was a general one, applicable to all organized counties and townships in the Territory; and the fifth section thereof declares that "if a majority of the electors, voting at such election, vote for the issue of bonds, the board of county commissioners shall cause such bonds as may be required by the terms of said vote, to be issued and delivered in accordance with section second of this act, in the name of such county or township, to be signed by the chairman of the board of county commissioners, and attested by the register of deeds, under the seal of the county." And the sixth section is this—"whenever any bonds shall be issued in pursuance of the foregoing provisions, it shall be the duty of the board of county commissioners, annually to

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proceed to levy and collect a tax on all the taxable property of the county or townships voting such tax, sufficient to pay the interest on said bonds: *Provided*, That no more than two per cent. of the assessed valuation of the property in any county or township, shall be raised in any one year under the provisions of this law, either for the payment of interest or bonds." The next sections provide for a sinking fund, and for the collection of the tax as county taxes are collected, and payment by the treasurer on presentation of the coupons, etc.

It is alleged that the session of the Assembly, at which the act of April 21, 1871, was passed, was wholly without authority of law; secondly, that the act itself was and is wholly illegal, nugatory and void; thirdly, that the vote of aid, and all proceedings thereunder, are and were inoperative and void; fourthly, that the said railroad company is a private corporation organized and operated solely for private gain; and, fifthly, that the act of Congress of May 27, 1872, so far as it operates to validate or authorize the taking of property by taxation or otherwise, for the benefit of said corporation, is invalid and of no binding force or effect.

A solution of these objections may be reached, by considering their main features. And in the first place, it is a well established principle that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may *lawfully* levy; and that all contracts by them, creating debts to be paid in future, (not limited to payment from some other source) imply an obligation to pay by taxation. The right of a county, or township, to contract a debt, must, therefore, be limited by its right to tax.

If in the case before us, no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it. The validity of a contract which can only be fulfilled by a resort to taxation, depends on the power to levy a tax for that purpose.

It is settled, by a vast weight of authority, that the building of a railroad is for a *public* purpose. Debts created by counties and other municipalities, in aid of railroad companies, are held to be valid on the ground that the purpose

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for which the taxes to pay them are levied, is for a public use, and for a purpose or object which it is the right and duty of the government to assist, by money raised from the people by taxation. Railroad corporations have the power to obtain right of way; they are subject to the laws which govern common carriers; these roads are established as post-roads; and, therefore, they possess these and the like characteristics of a public nature.

If Congress authorizes counties in a Territory to contract debts in aid of a railroad, it must intend to authorize them to levy such taxes as are necessary to pay the debts, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference. These general views prepare the way for an inquiry into the chief objection urged—namely, has Congress the constitutional power to enact such a law as the act of May 27, 1872?

And first, what are the sources of the power of Congress to legislate for a Territory of the United States, and what is the extent of that power?

In the case of the *American Insurance Co. v. Canter*, 1 Peters. 511, the sources of the power of Congress to legislate for a Territory were referred to by Chief Justice Marshall. He said that "the Constitution confers absolutely on the government of the Union the powers of making war and of making treaties; consequently, that government possesses the power of acquiring territory either by conquest or treaty." Again he remarked upon that clause of the Constitution which empowers Congress to make all needful rules and regulations respecting the territory or other property of the United States, and leaving the true source of the power as between the two an open question, he remarked that "perhaps the power of governing a Territory belonging to the United States, which has not, by becoming a State, acquired the means of self-government, may result necessarily, from the facts that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the

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right to acquire territory. *Which ever may be the source whence the power is derived, the possession of it is unquestioned.*" That is to say, without specifying or deciding whether the power arises by necessary implication from the right to acquire territory, or whether it proceeds from the express words "to make all needful rules and regulations respecting the territory," the possession of the power is admitted and cannot be questioned.

In the case of *Dred Scott v. Sandford*, 19 How., 393, Taney, C. J., in reference to the case of the *American Insurance Co. v. Canter*, said: "It is thus clear, from the whole opinion on this point, that the court did not mean to decide whether the power was derived from the clause in the Constitution, or was the necessary consequence of the right to acquire. They do decide that the power in Congress is unquestionable, *and in this we entirely concur*, and nothing will be found in this opinion to the contrary. The power stands firmly on the latter alternative put by the court—that is, as *the inevitable consequence of the right to acquire territory.*"

Mr. Justice Curtis, on the contrary, deduced the power of Congress to govern the Territories, not from the right to acquire, but from the power expressly granted to make all needful rules and regulations. He put it on the ground that as "this is a grant of power to Congress, that it is therefore necessarily a grant of power to legislate; and, certainly, rules and regulations respecting a particular subject, made by the legislative power of a country, can be nothing but laws. Nor do the particular terms employed, in my judgment, tend in any degree to restrict this legislative power. Power granted to a legislature to make all needful rules and regulations respecting the territory, *is a power to pass all needful laws respecting it.*" And again: "The question whether a particular rule or regulation be needful, must be finally determined by Congress itself. Whether a law be needful, is a legislative or political, not a judicial question. Whatever Congress deems needful is so, under the grant of power." And further: "I cannot doubt that this is a power to govern the inhabitants of the Territory, by such laws as Congress deems needful,

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until they obtain admission as States. Whether they should be thus governed solely by laws enacted by Congress, or partly by laws enacted by legislative power conferred by Congress, is one of those questions which depend on the judgment of Congress—a question which of these is needful.”

But in the present case, the source of the power of Congress is unimportant. In the *Dred Scott* case, the majority of the court admitted that, under the implied authority, Congress has power to organize and govern the Territories until they arrive at a suitable condition for admission to the Union; they admitted, also, that the kind of government which shall thus exist should be regulated by the condition and wants of each Territory, and that it is necessarily committed to the discretion of Congress to enact such laws for that purpose as that discretion may dictate. And Taney, C. J., in his opinion—save as to property in slaves—points out no limits to that discretion, save only those which are found in the Constitution itself. (See article I, section IX; also Amendments to the Constitution.)

Mr. Justice Catron, in a vigorous review of the source of the power, held “that Congress is vested with power to govern the Territories of the United States by force of the third section of the fourth article of the Constitution. (*Scott v. Sandford*, supra; *Cross v. Harrison*, 16 How., 193.)

Mr. Justice McLean held likewise, declaring that the power to make all needful rules and regulations is a power to legislate, because Congress cannot make “rules and regulations” except by legislation. In referring to the criticism of Taney, C. J., on the opinion of Marshall, C. J., in the case of the *Ins. Co. v. Canter* (supra) Justice McLean said—“I can see no want of precision in the language of the Chief Justice; (Marshall) his meaning cannot be mistaken. He states, first, the third section as giving power to Congress to govern the Territories, and two other grounds from which the power may also be implied. The objection seems to be, that the Chief Justice (Marshall) did not say which of the grounds stated, he considered the source of the power. He did not specifically state this, but he did say, “*which ever may be the source*



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whence the power is derived, *the possession of it is unquestioned*. No opinion of the court could have been expressed with a stronger emphasis; the power in Congress is unquestioned. But those who have undertaken to criticize the opinion, consider it without authority, because the Chief Justice (Marshall) did not designate specially the power. This is a singular objection. If the power be unquestioned, it can be a matter of no importance on which ground it is exercised."

And Mr. Justice Campbell, in same case, page 514, in illustrating the scope and operation of the third section of the fourth article of the Constitution, states that "this clause in the Constitution does not exhaust the powers of Congress within the Territorial subdivisions, or over the persons who inhabit them. Congress may exercise there all the powers of government which belong to them as the Legislature of the United States, of which these Territories make a part. (*Loughborough v. Blake*, 5 Wheat., 317.) Thus the laws of taxation," etc., "are as operative there as within the States." And again he says—"I admit that to make the bounds for the jurisdiction of the government of the United States within the Territory, and of its power in respect to persons and things within the municipal subdivisions it has created, is a work of delicacy and difficulty, and, in a great measure, is beyond the cognizance of the judiciary department of that government."

Kent, in Vol. 1, page 421, of his Commentaries, declares that "with respect to the vast Territories belonging to the United States, Congress have assumed to exercise over them supreme powers of sovereignty. Exclusive and unlimited power of legislation is given to Congress by the Constitution, and sanctioned by judicial decisions." And again, "the general sovereignty existing in the government of the United States over its Territories, is founded on the Constitution which declared that Congress should have power to dispose of and make all needful rules and regulations respecting the Territories, or other property belonging to the United States."

Mr. Abbott, in his work on U. S. Practice, (Vol. 1, page 185) says that "in legislating for the Territories, or the District of Columbia, Congress exercises *an exclusive power* of legisla-

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tion, under the general authority given by the Constitution in respect to the territory belonging to the United States."

In Story on the Constitution, (Vol. 2, § 1325) it is said that "no one has ever doubted the authority of Congress to erect Territorial governments within the territory of the United States, under the general language of the clause, "to make all needful rules and regulations." And in section 1328 it is further remarked, that "the power of Congress over the public territory is clearly *exclusive* and *universal*; and their legislation is subject to no control, but is absolute and unlimited, unless so far as it is affected by stipulations in the cessions, or by the ordinance of 1787, under which any part of it has been settled."

If then Congress possesses the power of exclusive legislation in and over the Territory of Dakota, it must follow that Congress also inclusively possesses the power of taxing the Territory. The grant to Congress of exclusive legislation over a Territory, necessarily implies the power to impose taxes for the public purposes of the Territory. The power thus to tax needs not to be particularly specified or expressed. It is inherent in every sovereignty. No constitutional government can exist without it.

In the case of *Providence Bank v. Billings*, 4 Peters, 561, Marshall, C. J., said—"the power of legislation, *and consequently of taxation*, operates on all persons and property belonging to the body politic. This is an original principle which has its foundation in society itself. It resides in the government as part of itself, and need not be reserved where property of any description, or the right to use it in any manner, is granted to individuals or corporate bodies. However absolute the right of any individual may be, it is still in the nature of that right that it must bear a portion of the public burdens, and that portion must be determined by the Legislature. This vital power may be abused; but the interest, wisdom, and justice of the representative body, and its relations with its constituents, furnish the only security against unjust and excessive taxation, as well as against unwise taxation." And again the same Judge says, in *McCulloch*

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*v. Maryland*, 4 Wheat., 430, it is "unfit for the judicial department to inquire what degree of taxation is the legitimate use, and what degree may amount to the abuse, of the power."

In the case of *Loughborough v. Blake*, 5 Wheat., 317, a question was made whether Congress had constitutionally a right to lay a direct tax, according to the rule of apportionment, on the District of Columbia, under the prohibition in subdivision 4. of section IX of article I,—“no capitation or other direct tax shall be laid, unless in proportion to the census or enumeration herein before directed to be taken.”

After a clear and elaborate argument on the power of Congress as to this right, the following words are found in the opinion: “If the general language of the Constitution should be confined to the States, still the sixteenth paragraph of the eighth section gives to Congress the power of exercising exclusive legislation in all cases whatsoever within this district. On the extent of these terms, according to the common understanding of mankind, there can be no difference of opinion.” What is this but declaring that any grant of exclusive legislation, carries with it the power to impose taxes? What is this but saying that, apart from any interpretation by legal minds, the common sense of mankind so construes such a grant?

Exclusive legislation in the district, or in a Territory, must mean such legislation as is suitable or needful in the government of such particular portion, or locality, of the whole domain termed the United States, in contradistinction to that other kind of legislation which embraces the entire community thereof. In respect to the latter, “Congress shall have power to lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States,” thus laying down the rule of uniformity, as well as that of apportionment above referred to, concerning direct taxation. But this power relates to general taxation throughout the Republic for purposes appertaining to its general welfare.

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But whence is derived, and who has, the power to tax the District of Columbia, or the Territory of Dakota, for its local purposes, and for its local welfare? The answer is, that the people of the United States ordained and established a Constitution, in which, and by which, the power of exclusive legislation, and, consequently, the power to tax, were granted to Congress over this Territory, as well as over the district, for all local objects and purposes.

The people of the United States permitted their representatives to tax a part of the society, organized under the Constitution, which is in a state of infancy advancing to manhood, and looking forward to complete equality as soon as that state of manhood shall be attained—as well for municipal or Territorial purposes, as for strictly natural objects.

The history of the legislation of Congress over the District of Columbia, abundantly exhibits and proves this marked division of the taxing power. In the one case, for national purposes, under the general power, contained in section eight, article 1, Congress has laid the taxes in proportion to the census; and duties, imposts and excises, under the rule of uniformity. In the other case, for strictly Territorial or municipal purposes, apart altogether from national objects, Congress imposed taxation on the particular subdivision, by virtue of its power of exclusive legislation, thereby exercising a power parallel to that of a State government. And this may serve to show the meaning of Marshall, C. J., in the case in 1 Peters, above quoted, in which that eminent Judge said that “in legislating for them” (the Territories) “Congress exercises the combined powers of the general and of a State government.”

Congress asserted its undisputed sovereign power, when, in the legislative grant contained in the Organic act of this Territory, it put certain restrictions or limitations upon the power of the Legislative Assembly in reference to the subject of taxation. And so likewise in regard to the District of Columbia. A Territory is, as it were, a vast municipal or public corporation, created by Congress, and deriving all its powers from the source of its creation. It is a great body politic and cor-

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porate, invested with subordinate legislative powers, to facilitate the due and proper administration of its own internal affairs, and to promote the general welfare of the municipality. Of itself it has no inherent jurisdiction to make laws, or to adopt governmental regulations; nor can it exercise any other powers in that regard than such as are expressly or impliedly derived from its charter or Organic act, or other act of Congress. And as with a mere ordinary municipal corporation in a State, so with a Territory, it is settled law, that the Legislature in granting the specific authority does not divest itself of any power over the inhabitants of the district which it possessed before the charter was granted, or the Organic act was passed. Unless the Constitution otherwise provides, the Legislature still has authority to amend the charter of such a corporation, to enlarge or diminish its powers, extend or limit its boundaries, divide the same into two or more, and to overrule its action whenever it is deemed unwise, impolitic, or unjust. (Cooley on Const., 2d Ed., 192.) The charters of such public corporations may be changed, modified, or repealed, as the public welfare may demand. (2 Kent Com., 305; 1 Greenl. Ev., 12th Ed., § 331; *Russel v. Reed*, 27 Penn. St., 170.)

This conclusion is reached, that as Congress has the power of exclusive legislation over this Territory, within which is necessarily included the right of taxation, therefore the Act of Congress of May 27, 1872, entitled "An act in relation to the Dakota Southern Railroad Company," is valid and constitutional.

The next consideration is as to the scope and effect of this act of Congress. It begins by terming the body of men who passed the Territorial enactment of April 21, 1871, as "the Legislative Assembly of the Territory of Dakota." As Congress was about to legislate on this Territorial act, they knew its origin and history, and had, of course, the whole body of it before them; and all its features, bearings and results were duly scanned and considered. Its title was "An act to enable organized counties and townships to vote aid to *any* railroad, and to provide for the payment of the same." It

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was, as has been remarked, a general act, applicable to all counties in the Territory, and to any railroad. In this shape, at least, Congress was averse to it; and it was accordingly disapproved and annulled, except in so far as Congress, in its wisdom, otherwise provided. The Territorial enactment thus became narrowed down to such transactions as had occurred, or might occur, between the voters of the counties of Union, Clay, Yankton and Bon Homme, and one railroad company, to-wit: the Dakota Southern. Contracts and engagements before that time made and entered into, between the parties specified, or that might thereafter be made, were sanctioned, approved and authorized. Any vote that had been given by the county of Yankton, granting aid to the said railroad, or any subscription thereto, or anything authorized by, and that had been done in pursuance of, the provisions of the Territorial act, toward the construction and completion of this particular railroad, was saved and reserved out of the general disapproval, and declared valid. And all the provisions of the Territorial act, so far as they authorize any vote of aid and subscriptions to the said railroad company, were declared to be and remain in full force. The purpose is clearly expressed by Congress, *i. e.*, to validate past transactions, done in pursuance of the Territorial enactment, between the said railroad and the specified voters.

The act of the Legislative Assembly, thus denuded of its public or general character, became, by the ratification of Congress, a private statute, concerning only a particular railroad company and a few municipalities. And the Supreme Court of the United States has repeatedly recognized the validity of private, curative statutes, and given them full effect, where the interests of private individuals were alone concerned, and were largely involved and affected. In *Satterlee v. Matthewson*, 2 Peters, 380, it was asserted that retrospective laws, which do not impair the obligation of contracts, or partake of the character of *ex post facto* laws, are not condemned or forbidden by any part of the Constitution.

In *Wilkinson v. Leland*, 2 Peters, 627, it was admitted that the act was retrospective, and yet gave validity to a void

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transaction. (See, also, *Watson v. Mercer*, 8 Peters, 88; *Le-land v. Wilkinson*, 10 *ibid*, 294; *Charles River Bridge v. Warren Bridge*, 11 *ibid*, 420; *Stanley v. Coll*, 5 Wall., 119; *Croxall v. Shererd*, *ibid*, 268.)

Cooley on Const. Limitations (page 374) says, that legislative acts validating invalid contracts have been sustained; and that when these acts go no further than to bind a party by a contract which he has attempted to enter into, but which was invalid by reason of personal disability on his part to make it, or through neglect of some legal formality, or in consequence of some ingredient in the contract forbidden by law, they cannot well be obnoxious to constitutional objection. The same author, under the head of "Retrospective Laws," in referring to contracts by municipal corporations, which, when made, were in excess of their authority, but subsequently have been confirmed by legislative action, states that "if the contract was one which the Legislature might *originally* have authorized, the case falls within the rule we have laid down, and the legislative action is to be sustained. Some of the cases where municipal subscriptions in aid of railroads were held valid, were cases where the original undertaking was without authority of law, and was confirmed by retrospective act of legislation." (Referring, *inter alia*, to *Thompson v. Lee County*, 3 Wallace, 327.)

But still more important is the case of *Beloit v. Morgan*, 7 Wallace, 619, in which it was held "that in cases of bonds issued by municipal corporations, under a statute upon the subject, *ratification* by the Legislature is in all respects equivalent to *original authority*, and *cures all defects of power*, if such defects existed, and all irregularities in its execution." (See, also, *Bissell v. City of Jeffersonville*, 24 How., 295; *Ritchie v. Franklin County*, 22 Wall., 68.)

The contract between the county of Yankton and the railroad company in question, was one which Congress might originally have authorized, and therefore the congressional action of May, 1871, ratifying the same, must be sustained. By the fifth section of the ratified act, it became the duty of, and it was obligatory on, the board of county commissioners

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to issue and deliver the bonds to the railroad company, if a majority of the electors voting at an election held in pursuance of the local act, had so decided; and to issue them in conformity to the amount specified by a majority of the ballots, and to the terms of payment, to the interest, extent of time, etc., thus voluntarily agreed upon. And in the view I have taken of this case there is no substantial difference between a vote of donation to aid a railroad, and a subscription to its capital stock.

But there is another point in the case which should receive consideration. The complaint shows that the bonds have been issued and delivered to the railroad company, with coupons attached representing the interest. It shows they were executed, issued and delivered in 1872 and 1873. And yet the railroad company has not been made a party defendant to this suit. The company is, so far as it appears, directly interested in the result; or, as is shown, the company has rights which must necessarily be affected by the judgment of this court. The opinion of the majority of the court ignores all claims of the company, and even of innocent holders. The absence of such party may be objected to, and taken at any time upon the hearing, or in the appellate court. Our local statute provides that "the court may determine any controversy between the parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must cause them to be brought in."

Here is a case in which this court undertakes to decide upon the rights of a party acknowledged to possess bonds in question to the amount of two hundred thousand dollars, in the absence of such party, and without any allegation that he is beyond our jurisdiction.

What rights and equities the railroad company may have, apart from the present display of the case, we know not; but surely before deciding, a party like this should be heard, or his absence regularly accounted for. (1 Peters, 299; 17 How., 130; 19 How., 113.)



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From the issuing of these bonds in 1872 until the bringing of this action in 1875, the county commissioners have annually levied a tax, designated as the railroad tax, for the purpose of paying the interest—and in none of these years has the levy exceeded two per cent. of the assessed valuation of the property. This has been done in pursuance of the sixth section of the ratified act of the Assembly. It would seem, therefore, that there has been acquiescence until this suit, which is one brought by a single taxpayer.

The plaintiff asks that the railroad tax levied on his property to pay the interest, may be declared illegal and void, and that the county and its agents may be perpetually enjoined from proceeding to collect such tax. The defendants, namely, the county itself and its treasurer, demurred to the complaint, for that the complaint does not state facts sufficient to constitute a cause of action. In other words, the county resists, by its pleading, the prayer of the plaintiff, and thereby, on this record, impliedly admits that the tax is lawful and valid, and, consequently, opposes the granting of the injunction.

I fully concur with the county and its financial agent in the view thus presented by their demurrer, and I hold, in accordance therewith, that the complaint does not state facts sufficient to give the plaintiff a cause of action.

The judgment of the District Court, which sustained the defendants' demurrer, and dismissed the complaint, should, in my opinion, be *affirmed*.

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DANFORTH V. CHARLES, ET AL.

1. *ATTORNEY'S FEES: STIPULATION FOR.* A stipulation in a mortgage for the payment of reasonable attorney's fees in case suit is commenced thereon, is valid, and may be enforced in any action brought for the foreclosure of the mortgage.
2. ———: ———: *IN POWER OF SALE.* A stipulation in a power of sale attached to a mortgage for the payment of a sum certain as attorney's fees in case the mortgage is foreclosed by advertisement under such power, cannot be recovered in an action to foreclose.

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*Appeal from Yankton County District Court.*

THIS is an action for the foreclosure of a mortgage, containing two stipulations relative to attorney's fees. The first in the mortgage proper, providing for reasonable attorney's fees, if suit should be commenced thereon; and the second being in the power of sale, and reads as follows: "And the proceeds of said sale, after deducting all expenses, taxes and insurance, *including twenty-five dollars attorney's fees*, to apply to the payment, etc." The plaintiff on the trial introduced three professional witnesses for the purpose of showing what would be a reasonable fee in the case. Two of these witnesses placed it at \$150, and one at \$200. The court disregarded the testimony of these witnesses, and allowed plaintiff the sum of \$25, being the amount mentioned in the power of sale. From this ruling and judgment plaintiff appeals.

*C. J. B. Harris*, for appellant.

*G. C. Moody*, for appellees.

BENNETT, J.—This appeal presents the question as to the right of plaintiff to recover on the stipulation in the mortgage for reasonable attorney's fees.

It is not claimed that a stipulation in this form, differs materially, so far as the right to recover thereon is concerned, from one wherein the amount is specified and fixed, as in the case of *Farmers' National Bank of Salem v. Rasmussen*, (*Ante* 60) decided by this court at the January term, 1875. But it is now contended that the court in that case held that the stipulation came within the provisions of section 831, Civil Code, relating to liquidated damages, in cases where it would be impracticable or extremely difficult to fix the actual damage. And therefore by implication ruling that a stipulation for reasonable attorney's fees could not be enforced. And it is further insisted by counsel for appellees that either stipulation is void, as being prohibited by sections 829 and 830 of the Civil Code, which read as follows: "Penalties imposed by

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contract for any non-performance, are void." \* \* \* "Every contract by which the amount of damage to be paid, or other compensation to be made for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided by the next section."

Stipulations of this character have been and are now enforced by courts of equity in almost every State and Territory in this country, so far as I have been able to extend my examination; and yet no principle is better settled or of more universal application than that courts of equity will never enforce either a penalty or a forfeiture. (Story's Eq. Jurisprudence, § 1319, and authorities cited.) Hence we are certainly justified in concluding that these courts have never construed a stipulation in a mortgage for attorney's fees, to be either a penalty or forfeiture. But what is the meaning of the term penalty?

It is defined to be a clause in an agreement, by which the obligor agrees to pay a certain sum of money, if he shall fail to fulfill the contract contained in another clause of the same agreement. A penal obligation differs from an alternative obligation, for this is but one in its essence; while a penalty always includes two distinct engagements, and when the first is fulfilled the second is void. When a breach has taken place the obligee has his option to require the fulfillment of the first obligation, *or the payment of the penalty*, (Bouvier's Law Dic.) but not both. He cannot compel compliance with the conditions, and then pursue the penalty, or *vice versa*, he must elect. If these propositions are correct law, with what degree of accuracy can this stipulation be termed a penalty? Is it a sum to be paid in lieu of a compliance with conditions and in full discharge of the obligation? Must the mortgagee elect before bringing suit, and abandon all his other rights under the contract, if he would collect the fee? Certainly not. I therefore conclude that it can in no sense be a penalty, and therefore does not come within the provisions of section 829, Civil Code.

But again, how can it be claimed that it comes within the provisions of section 830? That section simply provides that

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every contract, by which the amount of damage to be paid or other compensation to be made, is determined in anticipation, that is fixed, liquidated, is to that extent—that is of fixing and determining the amount, void, unless covered by the next section. In this case the amount is not fixed or determined, but must be reasonable, and is therefore left to the determination of the court or jury on evidence.

This court, in the case of *The Bank v. Rasmussen*, supra, held that under the provisions of section 831, it might be fixed and determined. As that question is not involved in this case, it is not necessary that we should review that decision. But it seems to me, that as the weight of modern adjudications is against the enforcement of stipulations for liquidated damages, that questions of attorney's fees in contracts of this character, should be regarded as open, and left to the sound discretion and judgment of courts, upon competent evidence, so that the allowance made in all cases should be reasonable, measured by the services rendered.

I am clearly of the opinion that the stipulation for reasonable attorney's fees, does not come within the provisions of the Civil Code referred to, and that it is legal and binding, and that the court below erred in disregarding the evidence introduced on this point—and in allowing plaintiff \$25 under the stipulation in the power of sale. Had that been the only stipulation relating to attorney's fees, contained in the instrument, and plaintiff having brought suit for the foreclosure of the mortgage, she would not have been entitled to recover under it, for that was payable only in the event of sale of the mortgaged premises under the power. (*Sage v. Riggs*, 12 Mich., 313.) Plaintiff must, therefore, recover under the stipulation for reasonable attorney's fees.

The judgment of the court below, so far as it allows and fixes the recovery for attorney's fees, is reversed, and the cause remanded.

REVERSED.

The People vs. Sponsler.

## JUNE TERM, 1876.

## PRESENT:

HON. PETER C. SHANNON, CHIEF JUSTICE.

HON. ALANSON H. BARNES,

HON. GRANVILLE G. BENNETT,

} ASSOCIATE JUSTICES.

## THE PEOPLE V. SPONSLER.

1. **GAMBLING: COMMON GAMBLER: INDICTABLE.** The keeping of a common gaming house is indictable at common law, and a person, who for gambling purposes, keeps or exhibits any gambling tables, establishment, device or apparatus, is deemed a common gambler, and punishable as for a misdemeanor under the statutes of this Territory.
2. **STATUTES: REPEAL: BY IMPLICATION.** A subsequent statute inconsistent with or repugnant to a former one repeals it by implication; and when a reviving statute covers the whole subject-matter of antecedent statutes, it virtually repeals them without any express repealing clause.
3. ———: ———: **PUNISHMENT CLAUSE.** If a new statute provides a milder punishment than was before imposed for the same offense, it repeals so much of the old law as concerns the punishment.
4. **JUSTICES OF THE PEACE: JURISDICTION: POWER OF LEGISLATURE.** The Legislature of the Territory has no power under the Constitution of the United States, or the Organic act, to confer upon Justices of the Peace jurisdiction to try and punish offenses which are infamous or indictable at the common law.

*Writ of Error to the Yankton County District Court.*

THE facts necessary to an understanding of the points discussed and decided by the court, are sufficiently stated in the opinion.

*G. C. Moody*, for defendant.

*J. R. Gamble*, District Attorney, for the People.

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1	302
2	298
46*	458
11*	507
46*	463

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SHANNON, C. J.—At the April term, 1876, of the District Court for Yankton county, the plaintiff in error was indicted for that on the 16th day of April, 1876, at the city of Yankton, in the county of Yankton, he did, for gambling purposes, unlawfully keep and exhibit a gambling table upon which to bet money, against the peace and dignity of the people of the Territory of Dakota, and contrary to the form of the statutes in such case made and provided.

He demurred to the indictment, and specified as the ground of objection thereto, that the said court had no jurisdiction of the subject-matter thereof. The demurrer was overruled, whereupon the defendant excepted and a bill was signed and filed.

Afterwards the defendant having elected not further to plead, but to stand upon his demurrer, moved the court to arrest the judgment, upon the ground—first, that the court had no jurisdiction over the subject of the indictment; second, that the facts stated in the indictment did not constitute a public offense.

The motion to arrest judgment was refused, and to this order the defendant excepted, and a bill was filed. Final judgment was then pronounced that the defendant pay a fine of one hundred dollars, and in default of payment be imprisoned.

The Penal Code contains a chapter of sixteen sections, upon the subject of "gaming." The first section of the chapter (being section 385 of the Code) declares that "it is unlawful to maintain or keep any table, cards, dice, or any other article or apparatus whatever, useful or intended to be used in playing any game of cards or faro, or other game of chance, upon which money is usually wagered, at either of the following places."

Here follows, in four subdivisions, a specification of the places and buildings. The next section (386) declares that "every person who knowingly violates the last section is guilty of a misdemeanor."

Section 387 prescribes that "every article or apparatus maintained or kept in violation of section 385, is a common and public nuisance."

## The People vs. Sponsler.

Passing over the intervening sections as not particularly important to the present inquiry, we come to the consideration of section 393. This long section when analyzed according to its disjunctives, as to its first clause, will read thus—"every person who, for gambling purposes, keeps or exhibits any gambling table, establishment, device or apparatus, \* \* \* \* is deemed a common gambler, and is punishable as for a misdemeanor."

Section 394 authorizes the seizure of any such table or apparatus, found in the possession of the person arrested, and enjoins it to be delivered to the magistrate, who (by the next section) may either cause it to be destroyed, or may deliver it to the district attorney.

Section 396 requires the district attorney, in this latter event, and upon conviction of the accused, to cause the gambling apparatus to be destroyed.

By section 398 it is made "the duty of all sheriffs, police officers, constables, and prosecuting or district attorneys, to inform against and prosecute all persons whom they have credible reason to believe are offenders against the provisions of this chapter; and any omission so to do is punishable by a fine not exceeding five hundred dollars." (Penal Code of January 11, 1865.)

At this point it may be observed that the keeping of a common gaming house was indictable at the common law. In the *People v. Jackson*, 3 Denio, 101, Bronson, C. J., said—"I have no doubt that the keeping of a common gaming house is indictable at the common law." (See, also, the *People v. Sergeant*, 8 Cowen, 140.)

In 1 Russ. on Crimes, 299, it is said that gaming houses are nuisances in the eye of the law, being detrimental to the public, as they promote cheating and other corrupt practices. Again in 1 Russ., 318 to 325, disorderly inns, bawdy houses, and common gaming houses, are ranked among nuisances.

In Bishop on Statutory Crimes, section 546, in relation to nuisances at the common law, it is said (quoting from Gabbett) that "all disorderly inns or ale houses, bawdy houses, gaming houses \* \* \* and the like are public nuisances,

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either by reason of their endangering the public peace, or as they affect public morals, or, perhaps, as being productive of idleness, or attended with public inconvenience."

Again, the keeping of a common gaming house is indictable at common law, on account of its tendency to bring together disorderly persons, to promote immorality, and to lead to breaches of the peace. (*United States v. Ismenard*, 1 Cr. C. C., 150; *United States v. Dixon*, 4 *ibid*, 107; *United States v. Milburn*, 4 *ibid*, 719; *United States v. Ringgold*, 5 *ibid*, 378; *United States v. Milburn*, 5 *ibid*, 390.)

Most of modern criminal statutes either confirm or enlarge common law offenses. It would seem that sections 385 and 392 of our Penal Code, in connection with sections 395 and 396, are, in substance, declaratory of the common law; whilst section 393, with what follows, is merely an enlargement of the common law offense. For, to repeat, if a person, for gambling purposes, keeps or exhibits any gambling table, he is deemed a common gambler—which is a conclusion of law—and he is punishable as for a misdemeanor. What next follows? The gambling table must, if seized, be totally abated by its destruction, in the same manner in which any public nuisance may be abated. (See on this point sections 1956, 1959 and 1960 of the Civil Code.)

But however all this may be, it is contended by the plaintiff in error that section 393 of the Penal Code of January, 1865, in relation to "gaming," has been impliedly repealed by the statute of January 10, 1873, it being "An act concerning gambling," because the new law covers all possible cases that could occur under the old law.

Let us examine the new enactment. It declares "that it shall be unlawful for any person or persons to keep or exhibit any table or gambling apparatus of any kind or description, on which to bet money or property of any kind, in the Territory of Dakota."

But the first clause of the old statute is almost identically the same. It makes it unlawful for every person to keep or exhibit any gambling tabling, establishment, device, or apparatus; but with more fairness and precision, it has the additional words "for gambling purposes."



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The superadded words of the new law, to-wit: "on which to bet money or property of any kind," do not give more clearness or strength than the other words "for gambling purposes." The former expression, indeed, rather tends to becloud the sense than to afford lucidity.

Section one, therefore, of the new law is but an awkward paraphrase of the first clause of section 393 of the old Code. The two enactments do not antagonize. They convey the same substantial meaning.

But there are other important clauses in section 393. The second one relates chiefly to *faro*. It runs thus: Every person who "is guilty of dealing '*faro*' or banking for others to deal '*faro*' or acting as '*lookout*' or gamekeeper for the game of '*faro*,' or any other banking game where money or property is dependent upon the result, \* \* \* \* is deemed a common gambler, and is punishable as for a misdemeanor."

The third clause is in regard to a different subject. It reads thus: Every person "who sells or vends what are commonly called lottery policies, or any writing, card, paper or document in the nature of a bet, wager, or insurance upon the drawing or drawn numbers of any public or private lottery, or indorses a book or any other document for the purpose of enabling others to sell or vend lottery policies, is deemed a common gambler, and is punishable as for a misdemeanor."

With this accurate analysis in view, what is there, then, in section one, or in any other part of the new statute, that comes in conflict with section 393 of the Penal Code? It is quite true that a subsequent statute inconsistent with or repugnant to a former one, repeals it by implication; and that when a revising statute covers the whole subject-matter of antecedent statutes, it virtually repeals them, without any express repealing clause.

In *U. S. v. Tynen*, 11 Wallace, 88, it was held that a subsequent statute on the same subject, which embraces all the provisions of a former one, and also new provisions, and imposes different or additional penalties, operates as a repeal of the former act, without any repealing clause.

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But a statute is not repealed by a subsequent one, unless the latter use apt and appropriate words for that purpose; or unless there be such a direct and absolute repugnancy between them, that both cannot stand together.

This new act, section six, merely repeals all acts and parts of acts in conflict with it. Everything else in the Penal Code must stand, and what remains must be construed together.

The punishment under the Code for keeping and exhibiting a gambling table, for gambling purposes, was by imprisonment in a county jail not exceeding one year, or by a fine not exceeding five hundred dollars, or by both such fine and imprisonment.

The punishment under the new act is by imprisonment in the county jail for not less than five nor more than twenty days, or by fine not less than fifteen nor more than one hundred dollars, to which is added a forfeiture of all furniture or movable apparatus within the establishment.

It is clear that if a new statute provides a milder punishment than was before imposed for the same offense, it repeals so much of the old law as concerns the punishment.

It follows, therefore, that whilst the punishment is altered, section one of the act of January 10, 1873, is but a general, substantial enunciation or confirmation of the old law as contained in the first clause of section 393—the two enactments being almost identical, and bearing the same meaning; whilst the other clauses of that section remain intact and unrepealed.

The next inquiry is: do the facts stated in the indictment constitute a public offense? By section 221 of the Code of Criminal Procedure it is provided that "words used in a statute to define a public offense need not be strictly pursued in the indictment; but other words conveying the same meaning may be used." Other requisites to an indictment are, a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended; and that the act charged as the offense, be stated with such a degree of certainty, as to enable the court to pronounce judgment upon a conviction, according to the right of the case. (§§ 214, 222, Code of Criminal Procedure.)

Another important section (223) is, that no indictment is insufficient, nor can the trial, judgment, or other proceedings thereon be affected, by reason of a defect or imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendant upon the merits.

Measured by these standards, how is it with the present case? The words used in the old statute to define this offense are: every person who, for gambling purposes, keeps or exhibits any gambling table, or establishment, or device, or apparatus, is deemed a common gambler (a presumption of law) and is punishable, etc.

In the new statute, the offense is defined in the following words: "It shall be unlawful for any person to keep or exhibit any table or gambling apparatus of any kind or description, on which to bet money or property of any kind."

The substantial definition, or gravamen, of the offense is, the keeping or exhibiting of any gambling table or apparatus, for gambling purposes—that is to say, on which to bet money or property. A glance at the indictment will suffice to show that it is good and sufficient under our Code. It possesses all the requirements; and the facts therein stated do constitute a public offense.

Upon what appears to be so plain a subject, it is not necessary to quote authorities, although numerous ones in point might be adduced.

The final inquiry is as to the jurisdiction of the District Court, which is controverted upon the ground of an Act approved January 10, 1873, entitled "An act to define the jurisdiction of the courts of justices of the peace," it being chapter 27 of the laws of 1872-3. It is as follows: "The justices' courts of this Territory shall have *exclusive jurisdiction* of all misdemeanors committed in their respective counties, where the maximum punishment fixed by law does not exceed a fine of one hundred dollars, or imprisonment in the county jail for a period of thirty days, or both such fine and imprisonment; also, of all offenses under the laws of this Territory, where the penalty is not specially provided for." The second section repeals all acts or parts of acts in conflict with the provisions of that statute.

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This singular and anomalous legislation in a Territory of the United States, might be dismissed with a few observations. Suppose they had, at the same session, reduced the punishment in all cases of misdemeanors (as was done as to gambling) to a fine not exceeding one hundred dollars or to imprisonment not exceeding thirty days, what would be the result as now contended for? Why, simply, that each justice of the peace would thereby have, in the language of this act, exclusive jurisdiction over all misdemeanors, thus depriving the accused of rights and privileges guaranteed to them by the Constitution of the United States. And if the assembly might reduce, in this way, the punishments attached to all misdemeanors, what is to hinder them from attempting to reduce felonies to misdemeanors, under the plea of economy, or for any other reason?

It would seem, however, that this piece of improvident legislation was almost copied from the Constitution of the neighboring State of Iowa, which, in section 11, article 1, declares that "all offenses less than felony, and in which the punishment does not exceed a fine of one hundred dollars, or imprisonment for thirty days, shall be tried summarily before a justice of the peace," etc. But it must be remembered that we are not a State, but a Territory. Our Constitution is that of the United States. Neither our Legislative Assembly nor our courts can contravene its mandates. An enactment contrary to its provisions, has no value or binding force. It enjoins that the trial of all crimes, except in cases of impeachment, shall be by jury; and this embraces all those crimes which, by former laws and customs, had been tried by jury. Article VI of the amendments, prescribes that in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury; and this, also, was intended to embrace all those crimes and misdemeanors which by our former laws and customs had been tried by jury. Article V of the amendments provides that no person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the

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militia when in actual service, in time of war or public danger. It follows from this, that no one can be put upon trial for such crimes as thus named, unless on a presentment or indictment of a grand jury.

By the legal phrase "infamous crime" was intended a crime which worked infamy and dishonor in one who had committed it, and which rendered the infamous person incompetent as a witness, considering him too corrupt, morally, to testify. As crimes that were at the time considered infamous the following may be specified, to-wit: treason, felony, all offenses founded in fraud and which come within the general idea of the *crimen falsi*, as perjury, subornation of perjury, forgery, swindling, cheating,—barratry, suppression of testimony by bribery, conspiracy to procure the absence of a witness—petit as well as grand larceny, receiving stolen goods, etc. It was not the punishment but the crime that rendered the person infamous. (Bishop Cr. Law. 744.)

In *Duffy v. People*, 6 Hill, 77, the Chancellor says that the crime of petit larceny was always considered infamous. The Constitution of New York, however, expressly excepts petit larceny in that article which requires an indictment for capital and infamous crimes. (1 Wright, 142; Willes R., 665; 6 Hill, 75.)

Certainly, with regard to the above offenses there must be, in a Territory, a grand jury to present or to indict the accused party.

Another clause in article V of the amendments, declares that no person shall be "deprived of life, liberty, or property, without due process of law." In the Ordinance of 1787, which is the model of our Territorial governments, it was declared that the inhabitants should always be entitled to the benefit of trial by jury, and of judicial proceedings *according to the course of the common law*; and that no man should be deprived of his liberty or property but by the judgment of his peers, or the law of the land.

Our own Organic act declares that the legislative power of the Territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and

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the provisions of that act; and that the Supreme and District Courts shall possess *common law* jurisdiction and authority for redress of all wrongs committed against the Constitution or laws of the United States, or of the Territory, affecting persons or property.

What is meant by the words "due process of law?" The Supreme Court of the United States, in *Murray's Lessee v. Hoboken Land Co.*, 18 How., 276, held that these words were undoubtedly intended to convey the same meaning as the words, "by the law of the land," in *Magna Charta*. In a part of the 29th chapter of *Magna Charta* it was declared that no freeman shall be taken, or imprisoned, or be disseized of his freehold, etc., but by lawful judgment of his peers, or by the law of the land. Coke in his commenting upon this statute says that these words "by the due course and process of law," which he afterwards explains to be "by indictment or presentment of good and lawful men, where such deeds be done in due manner, or by writ original of the common law." (2 Inst., 45, 50.) Story says that this clause in our amended Constitution, "in effect affirms the right of trial according to the process and proceedings of the common law." (2 Story on Const., § 1789, third edition; see also Kent's Comm., Vol. 1, page 612.) The meaning, therefore, of this phrase is that no person shall be deprived either of life, or of liberty, or of property, unless the matter shall be adjudged against him upon trial and according to the course of the common law. It will thus be seen that the same measure of protection against legislative encroachment, is extended to life, liberty, and property. As to all of them, the prosecution or suit must be instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt or determining the title to property.

Statutes which would deprive a citizen of the rights of person or property, without a regular trial according to the course and usage of the common law, would not be either "the law of the land," or "due process of law."

There is, however, another mode of prosecution, which exists by the common law in regard to the grade of common

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misdeameanors; though these also were ordinarily prosecuted upon indictments found by a grand jury. This species of proceeding was, in England at the suit of the King, without a previous indictment or presentment, and was termed *an information*. It was a complaint or accusation in writing exhibited against a person for some misdemeanor, and differed in no respect from an indictment in its form and substance, except that it was filed in the court of King's bench, at the mere discretion of the proper law-officer of the government *ex-officio*. The oppressive use of this mode of prosecution in England, occasioned struggles to procure a declaration of its illegality. But in the court of King's bench, all the Judges were clearly of the opinion that this proceeding was grounded on the common law, and could not be then impeached. A few years after that decision, *informations* were so restricted by act of parliament (4 and 5 W. and Mc., 18) that the law-officer should not file them without express leave from the court; and that every prosecutor, permitted to promote such information, should give security to prosecute the same with effect, and to pay costs to the defendant, in case of his acquittal, unless the Judge should certify there was reasonable cause for filing it. (4 Blackstone's Comm., 308.) But in 1 Bla. Rep., 542, it was said, that the court would always take into consideration the whole circumstances of the charge, before they would lend their sanction to this extraordinary mode of prosecution.

Mr. Justice Story (in Story on Const., Vol. 2, 1786) remarks, that "this process is rarely recurred to in America, and it has never yet been formally put into operation by any positive authority of Congress, under the national government in mere cases of misdemeanors, though common enough in civil prosecutions for penalties and forfeitures."

Congress, however, by act of May 31, 1870, did in part act on the subject, but merely as to offenses against the elective franchise. And now by section 1022 of Revised Statutes of United States, it is provided that "all crimes and offenses, committed against the provisions of chapter seven, title 'crimes,' which are not infamous, may be prosecuted either

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"by indictment or by information filed by a district attorney." An election of remedies is thus given to the law-officer, as at common law; and so by the Revised Statutes of Colorado, of the year 1868, section 134 of Criminal Code, the district attorney of any county may elect to proceed by information or indictment, in cases of gambling. (See *Chase v. The People*, 2 Colorado R., 509.) And, of course, the *information* at common law, was always triable in the court, by a petit jury, and never before a justice of the peace.

Recurring to article V of the amendments to the Constitution, whilst for capital or otherwise infamous crimes there must be presentment or indictment by a grand jury, yet, for crimes less than *infamous*, it would seem that mere information according to the course of the common law, would suffice. (See 2 Abb. U. S. Prac., 177.)

With these observations tending to point out the caution and care which should be practiced in our legislation, there is little to add concerning the statute in controversy—that of January 10, 1873, defining the jurisdiction of justices' courts—except that it must be noticed there is a later law—that of January, 1875—by which it is positively declared that the District Court has jurisdiction to inquire, by the intervention of a grand jury, of *all public offenses* committed or triable in the county or subdivision for which the court may be held. (Code Cr. Prac., § 17.) And by section 184 of same Code, it is also declared that the grand jury has power, and it is their duty, to inquire into *all* public offenses committed or triable in the county or subdivision, and to present them to the court, either by presentment or indictment.

In view of these fresh enactments, and aside from all other matters referred to, if the act in question ever was, in any degree, valid, and if it ever conferred exclusive jurisdiction, it must now be considered as having, at least, lost the feature of exclusiveness. And this is made plainer by section 19 of the new Code, which defines the jurisdiction of justices of the peace. Apart from their duties as mere committing magistrates, they may exercise such lawful original jurisdiction, under the Organic act, as is now or may hereafter be conferred on them.



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The People vs. Wambole.

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The burden of the complaint of the plaintiff in error, is, that he has been wronged because, under the mode pursued in his case, it required at least twelve citizens under their oaths to accuse him before he was called on to answer; and because he had the opportunity thereafter of a full panel of petit jurors from which to select his triers. He claims that he ought not to have had these privileges and benefits; that it was unlawful to accord them to him; and that he should have been accused by one man only, and tried before a justice of the peace.

But as no justice of the peace ever took cognizance of the case, there is nothing in the Code to hinder or prevent the grand jury from pursuing the line of duty imposed on them by their oaths [section 178] in regard to this public offense; and there is consequently nothing in said act of 1873 to oust the jurisdiction asserted by the District Court, to try the indictment when found.

There being no error in the record, or in the rulings of the court below, the judgment is affirmed; and it is ordered that the proceedings herein be remitted to the District Court of Yankton county, to enforce the original judgment.

All the Justices concur.

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THE PEOPLE V. WAMBOLE.

1. *GAMBLING*: COMMON GAMBLER: INDICTABLE. The rulings in the case of *The People v. Sponsler*, supra, adopted and followed. .

*Writ of Error to the Yankton County District Court.*

THE defendant was indicted in the court below "for unlawfully keeping and exhibiting a gambling table, for gambling purposes." The pleadings and proceedings were the same as in the case of *The People v. Sponsler*, supra.

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The People vs. Briggs.

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*G. C. Moody*, for defendant.

*J. R. Gamble*, District Attorney, for the People.

BY THE COURT.—For the reasons set forth in the opinion filed in the case of *The People v. Charles Sponsler*, and there being found no error apparent in the record herein, or in the rulings of the court below, the judgment is affirmed; and it is ordered that the proceedings herein be remitted to the District Court of Yankton county, to enforce the original judgment.

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THE PEOPLE V. BRIGGS.

1. *DISTRICT COURT: JURISDICTION: PROCEEDINGS IN JUSTICE'S COURT.* In cases of concurrent jurisdiction, after an indictment has been found and presented, the District Court cannot be ousted of jurisdiction by any proceedings subsequently commenced in a justice's court, resulting in the conviction or acquittal of the party indicted, on the same charge.
2. *JUSTICE OF THE PEACE: HOW CHOSEN: ILLEGAL APPOINTMENT.* A justice of the peace must be elected by the people in such manner as may be provided by law; and where the office of city justice is filled by appointment of the city council, such appointment is illegal and void, and clothes the appointee with no judicial power or authority to act.
3. *PLEADING: FORMER CONVICTION OR ACQUITTAL: EFFECT OF.* Where a defendant enters a plea of former conviction or acquittal alone, he elects to stand on such plea, and if the issue is found against him, he will not be permitted to enter a plea of not guilty, but the court must give judgment of conviction or acquittal according as the facts prove or fail to prove the former conviction or acquittal.
4. ———: ———: ———. A plea of former conviction or acquittal may be pleaded either with or without the plea of not guilty, and if the defendant does not desire to stand on his plea of former conviction or acquittal, he must unite therewith his plea of not guilty.

*Writ of Error to the Yankton County District Court.*

THE defendant was on the fourth day of May, 1876, indicted in the District Court charged with the offense of keeping a

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house of ill-fame, and on the 11th day of the same month a warrant was issued on which she was arrested. On the same day of her arrest a complaint was filed with the city justice charging her with the same offense; to this complaint defendant appeared, pleaded guilty, and was sentenced to pay a fine and the costs. When arraigned on the indictment on the 13th day of May she pleaded a former trial and conviction, and on the issue so joined the jury found for the People, when the defendant asked leave of the court to enter a plea of not guilty, which the court refused to permit, and entered a judgment of conviction, and sentenced the defendant.

From the rulings and judgment of the court the defendant takes her writ of error to this court.

*W. S. Arnold*, for the defendant.

On May 10th, 1876, the above plaintiff in error plead *autrefois convict* to the charge in the indictment against her, and after the finding of the jury "for the People" asked leave of the Hon. Court to plead over "not guilty," which motion was denied.

Section 274, laws of 1874-5, provides three kinds of pleas: Practice under pleas of *autrefois convict*, (Wharton Crim. Law, § 568.) Judgment in a plea of *autrefois convict*, (Wharton Crim. Law, § 572.) In all cases the question of guilty or not guilty is one which defendant is entitled to by right, no matter how many technical antecedent points may have been determined against him, and to have the same squarely decided by the jury. (Whar. Crim. Law, § 530; 22 Ark., 210, *Harding v. State*; 1 Ohio St. R., 16, *Hirn v. State*; 13 Mass., 455, *Commissioners v. Goddard*; 9 Mo., 696, *Ross v. State*.) That the court has no jurisdiction of the offense, but that jurisdiction is exclusive in the city court of the city of Yankton. (Laws of 1872-3, an Act to incorporate the city of Yankton, 160.) Had the legislature the right to confer this authority? (Dillon on Mu. Cor., 361, § 245, and note.) Power to suppress bawdy houses. (Dillon, 412, § 310.)

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*J. R. Gamble*, District Attorney, for the People.

The justice's court derives its existence from an unconditional act of the Legislature and the former conviction pleaded in this case is void, and therefore no bar to a prosecution under the indictment herein. He is appointed by the city council of Yankton, which act is in direct conflict with the Organic act. (Act incorporating city of Yankton, Laws of 1872-3, page 176, § 53; *People v. Raymond*, 37 N. Y., 428; 1 Bishop Crim. Law, § 1028; *Van Slyke v. Turnpealess Co. Insurance, &c*, 39 Wis., 390.) The crime charged in the indictment is an *indictable* common law offense. (1 Bishop Crim. Law, § 1083; 2 Wharton, § 2395); and being so the Legislature cannot create a tribunal to try such offenses, unknown to the common law, and subject a person to punishment in a summary manner without a common law trial; and if they do so attempt, the act is so far unconstitutional and void, and hence no bar to a prosecution in the proper court. (*Warren v. The People*, 3 Parker, 544; *Wood v. City of Brooklyn*, 14 Barbour, 425; *Uryum Lamer v. The People*, 13 N. Y., 378.) The District Court first acquired jurisdiction of the offense to the exclusion of the justice's court, and where courts have concurrent jurisdiction the court in which proceedings are first instituted retains it. (1 Bishop Crim. Pro., § 315, and cases cited; 1 Wharton, § 541, (a); U. S. ex-Rel., *Scott v. J. H. Burdick*, Dakota Territory.) The court must be one of competent jurisdiction, and if the justice's court in this case had no jurisdiction of the offense, it is no bar. (1 Wharton, § 541, (b). The power to enact by-laws does not extend to acts punishable by the general statutes. (1 Dillon Mu. Cor., §§ 356-58); and that power must depend upon the Constitution (see § 361), and where the Legislature or corporation undertakes to give its municipal courts jurisdiction to try persons for acts indictable, or on criminal offenses, it often happens that the Constitution is violated. (1 Dillon on Mu. Cor., §§ 362-63.) The defendant had no right to plead over after the verdict of the jury was "for the People," and against her. Such is the rule at common law, and such is *certainly* the rule

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under our statutes, where the plea is put in alone. (Code of Crim. Pro., § 276 (Sub. 3); Code of Crim. Pro., § 399 (Sub. 2); Code of Crim. Pro., § 428, *et seq.*; 1 Wharton, § 572; 1 Bishop Crim. Pro., §§ 755, 782-83; 1 Arch. Crim. Law, 371.) The argument of the attorney for the plaintiff in error, that some offenses at common law could be prosecuted by information by the district attorney, with leave of the court, has no application to the case at bar. The information must be made before a court known to the common law and as having jurisdiction as such to try the case in due form of law, and can have no application to a complaint before a municipal court, or magistrate, where a trial is had thereon in a summary manner and without a common law jury.

BARNES, J.—The indictment in this cause was found and presented May 4th, A. D. 1876; May 10th, 1876, warrant of arrest delivered to sheriff; May 11th, 1876, defendant arrested; and on May 13th, 1876, defendant pleaded a former trial, conviction, judgment, for the same offense before one Rosstauscher, a city justice.

In the proceedings before the city justice as appears by the record, the complaint was sworn to May 10th, 1876. It is, however, conceded upon the hearing, and such was the evidence in the court below, that the complaint before the city justice was not in fact made and sworn to before said justice until May 11th, 1876, and was by mistake or design dated back one day. It further appears that before a trial was had in the city justice court the defendant was arrested on the bench-warrant, issued from the District Court, and the defendant notified of the fact that she was indicted for this offense in the District Court.

It further appears from the record that on the day of the arrest when the defendant was brought before the city justice, that the defendant plead guilty to the charge of keeping a house of ill-fame; that she was by said justice thereupon adjudged guilty and fined the sum of fifteen dollars, which with costs taxed amounted in the aggregate to the sum of twenty-two dollars and seventy cents which was there paid to the

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city justice. Upon the trial of the issue of a former trial and conviction the jury in the District Court found against the defendant. And upon this trial of the issue of former trial and conviction (in the city court), a witness (Belle Wilson) was sworn in the District Court, and among other things testified that defendant was advised by the city justice that if she would pay a fine to him it would be a bar to a prosecution in the District Court. She thereupon, as appears of record, plead guilty and paid her fine. We forbear to express our conviction in befitting terms of this high-handed, unwarrantable conduct on the part of the city justice, as it is not important in the determination of this case. Nor is it necessary in deciding this case to pass upon the question as to whether the so-called city justice can act in any judicial capacity; but as this question has been raised, and as the city authorities desire to have the question considered by this court, we here insert an act of Congress that we regard, and that is, upon the argument by the city attorney, conceded to be, decisive on this question.

(U. S. Statutes at Large, § 1856): "Justices of the peace "and all general officers of the militia in the several Territories shall be elected by the people in such manner as the "respective Legislatures may provide by law."

We take judicial notice of the laws of the Territory, and by an examination of the law incorporating the city of Yankton, and as counsel upon the argument admit that the city justice was not elected by the qualified voters of city or county, and that his only authority to act judicially is derived from his election or appointment by the city authorities, it therefore follows that he is clothed with no judicial power or authority to act. The question as to whether the city justice, so-called, acted under color of office, and as to whether third parties are protected in their rights, we will not discuss or pass upon, but will dispose of this case upon the remaining and important question.

The issue of former trial and conviction having been determined by the jury in the District Court adversely to the defendant, the defendant's counsel insists as a matter of right

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that defendant must be permitted to interpose the plea of not guilty. This request in the court below was refused. Did the court err in this respect? This question has been argued with marked ability on the part of the plaintiff in error by Mr. Arnold, and per contrary by District Attorney Gamble, and must turn upon the construction of sections 274 and 399, of the Code of Criminal Procedure, enacted in 1874-5.

Section 274, provides as follows: "There are three kinds of pleas: 1st, guilty; 2d, not guilty; 3d, a former judgment of conviction or acquittal of the offense charged, which may be pleaded either with or without the pleas of not guilty."

It should be observed that the plea of former conviction of the offense charged is an admission of the guilt of the accused with an averment of conviction of the offense by a competent tribunal, and because of that former conviction the accused should not be subjected to another trial.

The plea of former conviction, therefore, is inconsistent with the plea of not guilty, and hence the rule of the common law that because of this inconsistency the two pleas could not be pleaded together, and the defendant in misdemeanors was compelled at his peril to elect upon which plea he would stand.

As to rule at common law see the following cases: (Code of Criminal Procedure, § 276, (3); Code of Criminal Procedure, § 399, (2); Code of Criminal Procedure, § 428, *et seq.*; 2 Wharton, § 572; 2 Bishop Criminal Procedure, §§ 755, 782-83; 1 Archibold, page 371.)

Now the statute above referred to has so far changed the common law rule as to allow these two inconsistent pleas—former conviction, and not guilty—to be pleaded together. This is giving to the defendant the benefit of two pleas, provided he pleads them together; whereas at common law he had but one. Must the defendant plead the two pleas together in order that each plea may be made available for the defendant? We think the two pleas must be interposed together or the defendant must stand upon the plea pleaded. We see no reason why this should not be so; and this view

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The People vs. Sweetser and Walbaum & Becker.

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of the case harmonizes with our present practice in criminal and civil cases, and in cases at law and equity; and it is in accordance with the progressive spirit of the age to allow the greatest liberty in pleading, and often to the extent of permitting inconsistent pleas, the purpose being to secure to parties all their rights, and at the same time avoid unnecessary delay. Had the defendant a desire to avail herself of the two pleas, she had only to have expressed that wish at the proper time. The evidence then would all have been taken and the court would have instructed the jury to pass upon the first plea, or issue, first; and if that issue was found for the defendant the investigation would proceed no further. If that issue was found against the defendant, then the jury would have to pass upon the issue of guilty or not guilty.

This, in our judgment, is a fair construction of this statute; and this view harmonizes with the provisions of section 399, the 2d subdivision of which reads as follows: "If the plea is a former conviction or acquittal of the same offense, the court must give judgment of conviction or acquittal, according as the facts prove or fail to prove the former conviction or acquittal."

Let the judgment of the District Court be affirmed, and this case remanded to that court for further proceedings, according to this decision.

The Chief Justice concurs. Associate Justice BENNETT did not sit in the case.

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THE PEOPLE V. SWEETSER.

THE PEOPLE V. WALBAUM AND BECKER.

1. *STATUTES: VALIDITY OF: CONSTRUCTION.* All statutes must be construed, if possible, so as to give them validity, force and effect. In doing this, respect must always be had to the language of the statute, the plain and obvious meaning of the words used, and the relation which one enactment bears to another, as well as their objects and purposes.



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2. ———: **AMENDATORY**: ———. In construing an amendatory act, the old law the mischief arising under it and the remedy which the new law may be supposed to provide, should be considered.
3. ———: ———: ———. An amendment becomes a part of the original act, whether it be the change of a word, figure or line, or the striking out of an entire section, or striking out and inserting, or in any other way modifying or altering its provisions.
4. ———: ———: ———. When an amendatory act sets forth the entire sections amended, they are to be construed as introduced into the place of the repealed sections, and in view of the provisions of the original act after such introduction.
5. ———: ———: ———. The amendment of a statute by a subsequent one operates as to all acts done subsequently, thereto as though the amendment had been a part of the original statute.
6. ———: **PENALTY: APPLICATION**. One section of the statute regulating the sale of intoxicating liquors, provides that "for every violation of the provisions of the first and second sections of this act, every person so offending shall forfeit and pay a fine, etc." *Held*:—That a person is liable to prosecution and punishment for the violation of either section. *And* and *or* are convertible as the sense of the statute may require, and this rule applies to criminal statutes.
7. **SALE OF INTOXICATING LIQUORS: INDICTMENT: SUFFICIENCY**. An indictment which charges the defendant with unlawfully and knowingly selling intoxicating liquors, to be drank in and upon the premises where sold, without having obtained a license and given bond as required by law: *Held*, sufficient, and that it is not necessary to describe the premises where, the person to whom, or the particular kind or quality of liquor, sold.
8. ———: ———: ———. Two or more persons may be jointly indicted for the sale of intoxicating liquors without license, when jointly engaged in the business, and if convicted the judgment must be several against each for the whole penalty.

*Writ of Error to the Yankton County District Court.*

DEFENDANTS were indicted in the court below for selling intoxicating liquors to be drank in and upon the premises where sold, without first having obtained a license and given a bond as required by law.

The indictment in each case charges that defendants, naming them, on a certain day—(being April 6th, 1876, in one, and March 15th, 1876, in the other)—“at the city of Yankton, in the county of Yankton, aforesaid, did unlawfully and knowingly sell intoxicating liquors, to be drank in and upon the

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premises where sold, without first having obtained a license and given a bond to the county commissioners of said county, as required by law." Concluding in the usual form "against the peace," etc.

A demurrer was interposed to each indictment, and the following causes assigned:

"1. The indictment does not substantially conform to the requirements of the statute, in this: It is not direct and certain as regards the particular circumstances of the offense charged, alleging neither the premises where sold, the person to whom sold, nor the kind or quality of intoxicating liquors charged to have been sold.

"2. That the facts stated in said indictment do not constitute a public offense.

"3. That the court has no jurisdiction of the subject-matter."

The demurrers were overruled by the court, and the defendants having elected not to plead, but to stand on their demurrers, filed their motions in arrest of judgment, setting out the same causes as those stated in the demurrers.

The court denied these motions and passed sentence. To all of which rulings of the court defendants duly excepted, and sued out their writs of error.

*S. L. Spink* and *G. C. Moody*, for plaintiffs in error.

*J. R. Gamble*, District Attorney, for the People.

BENNETT, J.—The questions involved in the determination of these two cases, being with one exception, identical, and having been argued and submitted as one cause, will be considered together in this opinion.

The statutes of this Territory, regulating the sale of intoxicating liquors, are in a somewhat confused condition; sufficiently so, perhaps, to justify counsel for plaintiffs in error in raising the question as to whether there is any offense created by them, or punishment attached to the violation of their provisions.

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All statutes must be construed, if possible, so as to give them validity, force and effect, and carry out the will of the legislator. In doing this respect must always be had to the language of the statute, the plain and obvious meaning of the words used, and the relation which one enactment bears to another, as well as their objects and purposes. And in construing an amendatory act, the old law, the mischief arising under it, and the remedy which the new law may be supposed to provide, should be considered.

The traffic in intoxicating liquors is a business which in the hands of the most prudent, and subject to the wisest control, is regarded as more or less dangerous and demoralizing to a community; the immediate cause of most of our brawls and disturbances, and of a great proportion of our crime and pauperism. The Legislative Assemblies of our Territory recognizing these facts, have had two leading purposes in view in their various enactments: *First*. To compel those engaged in the sale of intoxicating liquors, to be drank in, upon, or about the premises where sold, to submit to some wholesome restraints; making them liable in damages to any one injured thereby, and requiring them to put themselves in a position of pecuniary responsibility by filing a bond in the penal sum of three thousand dollars. *Second*. To enable counties and incorporated towns and cities to derive some revenue from those engaged in keeping dram shops and tippling houses.

If men will insist on crowding the calendars of our criminal courts, making necessary a larger police force in our towns and cities to keep the peace, and multiplying the number of paupers to be charges on the public treasury, it does seem reasonable that they should be required to contribute something toward relieving the burden which the curse of intoxicating drinks lays on community. Let us examine briefly these statutes, and see whether, even under the rules of strict construction, the facts alleged in these indictments do not constitute a public offense.

The first seven sections of chapter 30, laws of 1867-8, have been repealed, and need not be considered; the remaining

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sections will be referred to hereafter. Section 1 of chapter 25, laws of 1872-3, approved January 10, 1873, provided that it should be unlawful for any person to sell intoxicating liquors to be drank in, upon, or about the premises where sold, without first having obtained a license and given a bond. Section 2 makes it unlawful to sell to minors, except upon the written order of parents, etc., or to persons intoxicated, or who are in the habit of getting intoxicated. Section 4 reads as follows: "For every violation of the provisions of the *first and second* sections of *this act*, every person so offending shall forfeit and pay a fine of not less than \$20, nor more than \$100." The Legislature of 1874-5 passed another act on this subject,—chapter 21, entitled "An act *to amend* an Act, entitled 'An act to provide against the evils resulting from the sale of intoxicating liquors in the Territory of Dakota,' approved January 10, 1873." The first section of this act commences as follows: "Be it enacted, etc., that section one of an Act entitled, etc., approved January 10, 1873, *be amended so as to read as follows.*"

As the provisions of section four, act of 1872-3, applied to sections one and two of that act, and as section one has been repealed by the enactment of a substitute, it is now contended that there is no punishment prescribed for a violation of the provisions of the act of 1874-5. There might be something in this position, were this act of 1874-5 an independent, isolated act, perfect and complete in all its provisions, and not amendatory to the act of 1872-3, nor necessarily connected with its provisions by its very language, as well as its relation to the same subject-matter, and having the same object and purpose. If the last act had amended the former one by reducing the penalty in the bond, or by enlarging or abridging its conditions, or had it struck out all of section one relating to a bond, and left it simply unlawful to sell without license, or had it struck out all relating to a license, and made it unlawful to sell without first filing the bond, would not the provisions of section four still have applied? Certainly so clear a proposition could not be questioned. If it could be amended piece-meal, now a part and then a part, until it might be an entirely new section, why might it not

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be done by one act, by at once striking out and inserting, or amending so as to read entirely different?

I think no principle plainer or better settled, than that an amendment becomes a part of the original act, whether it be the change of a word, figure or line; or the striking out of an entire section; or striking out and inserting, or in any other way modifying or altering its provisions.

Where an amendatory act sets forth the entire sections amended, they are to be construed as introduced into the place of the repealed sections, and in view of the provisions of the original act after such introduction. (*McKibben v. Lester*, 9 Ohio N. S., 627.) Thus, the words in the amendatory act "under the limitations herein provided," must be held to apply to the limitations of the original act after the amended sections are in place. (*Ibid*, also, *Conrad v. Nall*, 24 Mich., 275.) The amendment of a statute by a subsequent one operates, as to all acts done subsequent thereto, as though the amendment had been a part of the original statute. (*Holbrook v. Nichol*, 36 Ills., 161.) And in England it has been held that where a new proviso was substituted for an old one in nearly the same terms, the new proviso and the original statute must be read as one act, *i. e.*, as though the proviso had originally been in the amended form. (*Queen v. St. Giles*, 3 E. & E., 224.) I therefore hold that section one of chapter 21, laws of 1874-5, was enacted in lieu of and took the place of section one, chapter 25, laws of 1872-3, the new being substituted for the old section, and that this new section, and the old statute into which it has been inserted, must be read as one act, as though it originally had been in the amended form, and any one violating its provisions is punishable as provided in section four.

Again, it is contended that defendants cannot be punished unless guilty of a violation of *both* sections one *and* two, a violation of the provisions of one of these sections alone not being sufficient, as section four provides a punishment for any one violating the provisions of the first *and* second sections. This objection savors entirely too much of captious hypercriticism, and I shall dispose of it with a very few

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words. Can it be supposed for a moment that the Legislature intended to permit parties to sell, to be drank on the premises, without license or bond, provided they did not sell to the persons mentioned in section two? Again, section two is an absolute prohibition of the sale of intoxicating liquors, in any quantity and for any purpose, to the persons therein named, subject to an exception in case of minors. Now can it be that the Legislature intended that this section might be disregarded, and its provisions violated with perfect impunity, and with complete immunity from the possibility of punishment, provided the offender did not at the same time sell to be drank on the premises? I think the clear intention—and such is certainly the most reasonable, in fact the *only* reasonable construction—was to provide for the punishment of the violation of either section. Any other construction would render the statute a dead letter. Even a penal law should not be construed so strictly as to defeat the obvious intention of the Legislature. (*American Fur Company v. United States*, 2 Peters, 358.) *And*, and *or* are convertible as the sense of the statute may require. (*Townsend v. Read*, 10 C. B. (N. S.) 308; *Boyles v. Murphy*, 55 Ills., 236.) And this is the rule even in a criminal statute. (*State v. Myers*, 10 Iowa, 448; *Miller v. The State*, 3 Ohio St., 476.)

Some question has been made as to the authority that should grant the license. This we think sufficiently answered by the provisions of section one, third *proviso*: “It shall be competent and lawful for both the county commissioners of any county, and also the mayor and city council, or other authorities of any town or city situated therein, to require the payment of the license herein provided.” The bond is required to be given to the commissioners of the county; they are the fiscal agents of the county, authorized to transact all its business; and if empowered to take the bond, and approve the same, and receive and receipt, through the treasurer for the money, it follows as the most natural sequence that they should issue the license, and the law clearly contemplated that, although it might, perhaps, have been stated in language more concise and definite.

I therefore arrive at the conclusion that it is a public offense

under the statutes of this Territory, to sell intoxicating liquor to be drank in, upon, or about the premises where sold, without first having obtained a license and given bond.

On the question of jurisdiction I have only this to say: It will be borne in mind, that in our view, as before stated, chapter 25, laws of 1872-3, and chapter 21, laws of 1874-5, are to be read and construed as one act, the latter being an amendment to the former. When by section 2 of the latter act, sections 89 and 10 of chapter 30, laws of 1867-8, were revived and re-enacted, they became a part of that act to all intents and purposes, the same as if they had been re-written *verbatim et literatim* and embodied therein; and the Legislature by re enacting the provisions of these sections, restored to the District Courts concurrent jurisdiction with justices of the peace, in all prosecutions arising under the act of 1872-3, as amended, which had been taken away by the provisions of chapter 27, laws of 1872-3.

I now come to the consideration of the objections made to the sufficiency of the indictment, which counsel have put in the following form in their demurrer, which is the same in each case: "It does not substantially conform to the requirements of the statute, in this:—it is not direct and certain as regards the particular circumstances of the offense charged; alleging neither the premises where sold, the person to whom sold, nor the kind or quantity of intoxicating liquors charged to have been sold."

As a general rule it is sufficient to charge the offense in the language of the statute, and this is especially true of purely statutory offenses. (1 Bishop's Crim. Pro., § 611, and numerous authorities there cited.) Now, what is the language of the statute under which these indictments are drawn? "It shall be unlawful for any person or persons, by agent or otherwise, without first having obtained a license and given a bond, to sell in any quantity intoxicating liquors to be drank in, upon, or about the premises where sold, etc." The indictment charges the defendants with unlawfully and knowingly selling intoxicating liquors to be drank in and upon the premises where sold, without first having obtained a license and given bond as required by law. In this the

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district attorney has followed almost the exact language of the statute, and yet it is claimed not to be sufficient.

Section 215, Code of Criminal Procedure, is as follows: "The indictment must be direct and certain, as it regards:—  
1. The party charged. 2. The offense charged; and 3. The particular circumstances of the offense charged, when they are necessary to constitute a complete offense."

In these indictments there is no question as to the certainty of the parties charged. The offense charged is the selling of intoxicating liquors to be drank in and upon the premises where sold, without first having obtained a license and given bond. Are there any other circumstances necessary to constitute a complete offense? It is no crime in this Territory to sell intoxicating liquor, or to sell it to be drank on the premises where sold, but the gist of the offense consists in so selling it without first having obtained a license and given a bond. It is no crime under the United States statutes to engage in the business of a wholesale or retail dealer in tobacco and cigars, or spirituous or malt liquors, but it becomes criminal when engaged in without first having paid the special tax. And in all prosecutions for violations of these United States statutes, I know of no precedent or authority that requires the particular premises where and the person to whom the liquor, tobacco or cigars were sold, to be stated in the indictment.

So also in relation to the sale of liquor to an Indian, under the charge of an Indian superintendent or agent. In no case which I have been able to find is there any question as to the particular premises where sold. In some cases the name of the Indian is given, in others it is not, and both forms have been held good. (*United States v. Holliday*, and *Same v. Haas*, 3 Wall., 407.) It does seem to me that there can be no reason for insisting upon any greater particularity in the one case than in the other. All that has been said in relation to the necessity of a certainty that will enable defendants to plead a former acquittal or conviction, applies with equal force to indictments under the United States statutes referred to. The authorities are irreconcilably conflicting, both the



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courts and text writers. Wharton lays down the rule that in an indictment for selling spirituous liquor in small quantities without a license, it is unnecessary to aver to whom sold, or the number of persons. (2 Wharton's Crim. Law, § 2445, and cases cited.) This rule has been adopted in several of the States. (*State v. Adams*, 17 Wendell, 475; *Osgood v. The People*, 39 N. Y., 449; *State v. Gummar*, 22 Wis., 422; *State v. Rice*, 38 Ills., 435; *Commonwealth v. Baird*, 4 S. & R., 141.) The Supreme Courts of Missouri and Texas have vacillated, while in a great number of States it is held that the name of the person to whom sold should be averred. (See also 1 Bishop's Crim. Pro., § 548.) One fruitful cause, doubtless, of this conflict of authority, grows out of the difference in the language, construction and phraseology of the various statutes on which the decisions are based. I can see no reason under our statute why the name of the party to whom sold, should be alleged; and in arriving at this conclusion, I think I follow the better reasoned cases, as well as the clearer and steadier light of the Supreme Court of the United States, in its construction of statutes, and the forms of proceedings which it has approved, analogous to those under consideration.

These indictments allege a *sale* and under this averment, all the facts necessary to constitute a sale, can be proven. A sale is, by our Civil Code, §§ 1855, 1856, defined to be "a contract" by which, for a pecuniary consideration, called a price, one transfers to another an interest in property. But section 5, chapter 25, laws of 1872-3, provides that "the giving away of intoxicating liquors, or other shift or device to evade the provisions of this act, shall be deemed and held to be an unlawful selling, etc." Bishop (1 Vol. Crim. Pro., § 514) says: "Suppose a statute makes penal an unlicensed 'sale' of intoxicating liquor, it may be a question whether the word 'sale' or 'sold,' the exact word used in the statute, will sufficiently describe the act of selling; or on the other hand, whether the indictment must specify the things done, which constitute the sale." This is the exact point insisted upon by counsel for plaintiffs in error in these cases. "Now," continues Mr. Bishop in the same connection, "there enters always into a sale the element of price; and in Indiana, the

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court held that every indictment under this statute must set out the price; because 'price is an essential element in the idea of a sale.' Said Stuart, J.: 'Every fact essential to be proved should be alleged. \* \* \* Perhaps, had all the facts been stated, the court might have considered it a barter.' " (*Divine v. The State*, 4 Ind., 240, and other cases decided by that court.) Bishop concludes by saying: "The course of things in most of our States, has been to accept as good the particular allegation, which the Indiana court decided to be bad." (*Clare v. The State*, 5 Iowa, 509; *Wrocklege v. The State*, 1 Iowa, 167; *vide*, also, 15 Mo., 478; 24 *ibid*, 363; 8 Met., 530; 23 Pick., 275; 6 Grat., 667; 3 Hill, S. C., 187, and 17 Ills., 101.) But under our statute no price need be paid in order to constitute the offense; if the liquor is given away, or disposed of by any other shift or device, to evade the statute, it is an unlawful selling under its provisions, and the question as to whether it might not be a barter, suggested by the Indiana court, becomes wholly immaterial.

Again: Why should the particular kind of liquor be averred? The statute uses the comprehensive phrase, "intoxicating liquors;" that includes all kinds of liquors that will produce intoxication, and makes the sale of all alike unlawful; and it matters not what particular kind is sold, the offense is the same. Neither can it be material to the defense, except that it may close a very wide door through which, otherwise, the guilty might escape. Were the prosecution required to allege the specific kind of liquor sold, it might be very difficult to prove it, in these days of adulterations and villainous concoctions. Some courts have held, under statutes, making it unlawful to sell without license, liquors specified, such as wine, gin, brandy, whisky, &c., the indictment must aver the particular kind. But where the statute speaks of it only as "intoxicating liquors," an averment any more specific than that in an indictment, is not required. Neither is it necessary to allege the amount sold. The statute says "in any quantity to be drank in, upon, or about the premises where sold." It is, therefore, as much a violation of the statute to sell one drink as one quart for the purpose men-

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tioned. But now it may be asked, what is the meaning of subdivision 3 of section 215, Code of Criminal Procedure, which requires an indictment to contain "the particular circumstances of the offense charged, when they are necessary to constitute a complete offense?"

Section 2, chapter 25, laws of 1872-3, makes it unlawful to sell to minors, except on the written order of parents, etc., or to persons intoxicated, or who are in the habit of getting intoxicated. Here the offense is more particularly against the person to whom the liquor is sold. It is not unlawful to sell liquor, provided it is not sold to be drank on the premises where sold, or to sell to be drank on the premises, if the seller have a license. Therefore to constitute a complete offense under section 2, *supra*, other circumstances of the selling must be given. If the sale was made to a minor, that fact must be stated, and the existence of an order from a parent, etc., negatived. If to a person intoxicated, or who is in the habit of getting intoxicated, the fact must be averred. And as the gist of the offense consists in the sale to the particular classes of persons mentioned, the name of the person to whom sold must be averred if known, if unknown, so stated, in order that he may be identified, and evidence introduced on the material point of minority, intoxication, or habits of inebriety.

Numerous other examples might be given, but as we find in the statute under consideration, an illustration so apt and satisfactory, I do not deem it necessary to pursue the inquiry further.

One point further only remains to be noticed in the case against Walbaum and Becker. They were jointly indicted, and it is now urged that but one judgment could be entered against them, or one fine assessed against them both. This is not the law. Two persons may be jointly guilty and jointly convicted of the offense of retailing spirits. (Wharton's Crim. Law, § 2445.) If they may be jointly guilty and jointly convicted, and yet but one judgment be pronounced, or but one fine imposed, which party shall bear the punishment? If committed until fine and costs are paid, which one

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shall be sent to jail? Nothing is better settled, in either law or ethics, than that he who violates the law, whether alone or jointly with others, must for himself and alone bear the penalty.

The same doctrine is also laid down by Bishop on Crim. Pro., Vol. 1, § 469: "It is common to indict jointly for such offenses as the selling of intoxicating liquor without license," and cites the case of *Commonwealth v. Sloan*, 4 Cush., 52; *vide*, also, *State v. Caswell*, 2 Humph., 399. Bishop, in his work on criminal law, Vol. 1, § 957, sums the whole question up as follows: "Thus where a pecuniary penalty is imposed by statute for the sale of intoxicating liquor without license, all who participate in a particular sale may be proceeded against jointly, whether by action or indictment. But if by indictment, the judgment is several against each for the whole penalty, while if by action, it is joint, and the penalty can be collected only once out of all:" citing numerous authorities.

We find no error in the record before us, and the judgments are, therefore,

AFFIRMED.

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DECEMBER TERM, 1876.

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PRESENT.

HON. PETER C. SHANNON, CHIEF JUSTICE.

HON. ALANSON H. BARNES,     }  
HON. GRANVILLE G. BENNETT, } ASSOCIATE JUSTICES.

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McCALL V. THE UNITED STATES.

*I. EVIDENCE:* BEST OR HIGHEST: REASON OF RULE. The principle of the rule requiring the best or highest evidence, is founded on the presumption that there is something in the better evidence which is withheld, adverse to the party resorting to inferior or secondary evidence.

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2 94  
2 297  
2 462  
46\* 008  
2\* 254  
11\* 104  
11\* 506

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2. ———: EFFECT OF THE RULE. The general effect of the rule is to prevent fraud, and to induce parties to bring before juries the kind of evidence least calculated to mislead or perplex them. The reason of the rule limits the extent of its application; consequently it does not operate where the law itself obviates the presumption of fraud, which would otherwise arise.
- Application of the rule.*—In general to prove that a person is a public officer, it is sufficient to show that he is acting as such. So where a document is of a public nature, a copy is sometimes admitted, for the production of the original is dispensed with on account of the inconvenience resulting from the frequent removal of such papers; and therefore, the absence of the original affords no presumption of fraud.
3. ———: HEARSAY: ADMISSIBILITY. The admissibility of hearsay on questions of public right, is so well established upon authority, that its competency is not disputed, however widely courts may differ upon its force and effect. Where the question is as to territorial limits, and where the boundary concern<sup>s</sup> the extent of a public municipal jurisdiction, either public reputation, or the particular declarations of deceased persons, made *ante litem motam*, are receivable.
4. ———: PUBLIC DOCUMENTS: OFFICIAL PUBLICATIONS. All publications of State papers, maps, charts, and public documents, when such publications are by authority of Congress, are as valid evidence as the originals from which they were copied, and may be introduced and read as evidence on mere inspection.
5. ———: MAPS: GROUNDS OF ADMISSION. Maps stating boundaries are receivable in evidence, provided it appears that they have been made by persons having adequate knowledge. And in cases where they have been admitted, their admissibility has depended on the ground of their being *public documents*, or upon the other ground of their being in the nature of admissions.
6. *INDICTMENT*: CONSTITUENT ELEMENTS: RIGHTS OF ACCUSED. In criminal cases, prosecuted under the laws of the United States the accused has the right "to be informed of the nature and cause of the accusation against him," and the indictment must set forth the offense with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged.
7. ———: OBJECTS OF: CERTAINTY. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.
8. ———: COPY TO ACCUSED: WAIVER. A person indicted under the laws of the United States for any other capital offense than treason is entitled to the privilege of having delivered to him a copy of the indictment and list of jurors and witnesses, at least two entire days before trial. *Held.*—That the entry of a plea of not guilty and proceeding to trial by defendant is a waiver of the statutory privilege, and cures the objection that no copy of indictment was furnished or that the copy served was defective.

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9. *JURISDICTION: INDIAN RESERVATION: HOMICIDE.* A trial for homicide committed on an Indian reservation must be had on the Federal side of a Territorial court, and is governed by the United States statutes and the rules of the common law.

*Writ of Error to the Yankton County District Court.*

THE facts are stated in the opinion.

*Oliver Shannon*, for plaintiff in error.

*William Pound*, U. S. Attorney, for defendant in error.

SHANNON, C. J.—The defendant below was, on the 18th of October, 1876, indicted on the Federal side of the District Court, for the murder of William Hickock, *alias* "Wild Bill." He pleaded "not guilty;" and on the 6th of December, 1876, the jury brought in a verdict of "guilty of murder as charged in the indictment."

After the overruling of motions in arrest of judgment and for a new trial, the District Court, on January 3d, 1877, sentenced the prisoner to death, and immediately thereupon this writ of error was sued out.

The indictment charges that the offense was committed in the Sioux Indian Reservation, set apart under the treaty proclaimed February 24th, 1869, at a place in said reservation called Deadwood in said district and territory, said reservation then and there being in the Indian country, and a place within the sole and exclusive jurisdiction of the United States, and within the jurisdiction of this court.

To establish the *locus in quo*, the prosecution offered without objection oral evidence tending to show that Deadwood is a place or gulch in the Black Hills, of over fifteen hundred inhabitants, and reputed to be in this Territory; also, that it is located on Whitewood Creek, is about eight miles farther west than Bear Butte, and that Bear Butte is a prominent landmark, and can be seen for forty miles this way.

Further, to show that Deadwood and Bear Butte are within this district, the prosecution offered a printed volume, the title-page being in the words and figures, as follows:

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"44th Congress, 1st session, House of Representatives. Ex. Doc. 1, Part 2, Vol. 11. Annual report of the Chief of Engineers to the Secretary of War, for the year 1875, in two parts. Part II.—Washington, government printing office, 1875."

Also with said book, two maps appertaining thereto, one being "map of the Black Hills from a reconnoissance by Capt. William Ludlow, corps of engineers, 1874, and maps of Warren and Raynolds;" and the other being "a geological map of the Black Hills by Professor N. H. Winchell, to accompany the report of Capt. William Ludlow, United States engineers."

This offer of the book and its maps, was objected to by the counsel for the defendant, as incompetent, irrelevant, not the best evidence, etc.

The objection was overruled, and the evidence admitted; to which ruling an exception was taken.

The prosecution as to the *locus in quo*, also offered in evidence "National map of the territory of the United States "from the Mississippi River to the Pacific Ocean—made by the "authority of the Hon. O. H. Browning, Secretary of the "Interior—in the office of the Indian Bureau, chiefly for "government purposes, under the direction of the Hon. N. G. "Taylor, Commissioner of Indian Affairs, and Hon. Chas. E. "Mix, Chief Clerk of the Indian Bureau; compiled from "authorized explorations of Pacific Railroad routes, public "surveys, and other reliable data from the departments of "the government at Washington, D. C., by W. J. Keeler, "Civil Engineer, 1867."

The offer was objected to as incompetent, and because the map is not sufficiently identified and proved. The objection was overruled, and the map allowed to be given in evidence. To this ruling an exception was taken.

In this connection, the prosecution likewise offered in evidence a map of the Territory of Dakota upon which is printed these words, to-wit: "Department of the Interior—General Land Office—S. S. Burdett, commissioner, Territory of Dakota, 1876, compiled from the official records of the

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General Land Office, and other sources, etc., the said map being bound with other maps, in a volume, or atlas, the printed title-page of which is in the following words and figures:

"Department of the Interior, General Land Office, geographical and political atlas of the States and Territories of the United States of America, in which the public land surveys are now in operation. S. S. Burdett, commissioner, Washington City, 1876."

To support the offer, William P. Dewey testified *inter alia*, as follows: "I am the Surveyor General of this Territory. This map is official; it was transmitted to me officially by the Commissioner of the General Land Office, as an official map from that office, and with it an official communication. The original draft of this map was made in my office in 1875, and forwarded to the department prior to September 1st, 1875."

Edward F. Higbee, an attache of the Surveyor General's office, testified *inter alia*, as to this map, as follows: "I took the data from Ludlow's map. Col. Ludlow was topographical engineer with Custer's expedition. I took Ludlow's map as the source for putting down the Black Hills as set forth in this map."

The defendant, by his counsel, objected to the introduction of this map as evidence, because of its incompetency, and that it is not a certified copy of the original survey, or map, or drafts. The objection was overruled, and an exception was taken.

The volume entitled "annual report of the Chief of Engineers to the Secretary of War," contains the report, made by William Ludlow, captain of engineers, U. S. A., of a reconnoissance of the Black Hills of Dakota, made in the summer of 1874; with a summary table of daily instrumental observations, with deduced altitudes, *the latitude and longitude* of each camp, distances traveled, etc.; to which table the particular attention of the jury was called by the U. S. Attorney. The expedition, according to the report, encamped six or seven miles south of Bear Butte on the 14th and 15th



of August; and it is spoken of as "a well-known landmark," and "a well-known point north of the Black Hills." The table shows the latitude of the Bear Butte camp to be 44 degrees, 23 minutes, 43 seconds; and the longitude 103 degrees, 25 minutes, 19 seconds.

The question here presented, is, did the District Court err in allowing the foregoing matters to be given in evidence to the jury?

The principle of the rule requiring the best or highest evidence, is founded on the presumption that there is something in the better evidence which is withheld, adverse to the party resorting to inferior or secondary evidence. The general effect of the rule is to prevent fraud, and to induce parties to bring before juries the kind of evidence least calculated to mislead or perplex them. And the reason of the rule limits the extent of its application; consequently, it does not operate where the law itself obviates the presumption of fraud, which would otherwise arise. Hence, in general, to prove that a person is a public officer, it is sufficient to show that he acted as such. So, where a document is of a public nature, a copy is sometimes admitted, for the production of the original is dispensed with on account of the inconvenience resulting from the frequent removal of such papers; and therefore, the absence of the original affords no presumption of fraud.

The admissibility of hearsay on questions of public right, is so well established upon authority, that judges the most fastidious in regard to this kind of evidence, do not pretend to dispute its competency, however widely they may differ upon its force and effect. It may, therefore, be taken as settled, that where the question is as to territorial limits, and where the *boundary* concerns the extent of a *public municipal jurisdiction*, (as whether lands lie, or rights are exercisable within its true limits), either public *reputation*, or the particular declarations of deceased persons, made *ante litem motam*, are receivable. (Note 87, 1 Ph. on Ev., page 180; see also *Ellicott v. Peal*, 10 Peters, 435, 438, where reputation of matters or claims of a public nature, and general reputation as to boundary, are held to be admissible.)

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In England, in the case of *Rex. v. Holt*, 5 Term Rep., 436, the King's bench held that the London Gazette was *prima facie* evidence of matters of state. In 1 Ph. on Ev., § 619, it is stated that the courts will notice the London Gazette, without proof that it was bought at the Queen's printers, or other proof of the place whence it came. And in 2 Ph., § 276, it is said that the public acts of government, and acts by the King in his political capacity, are commonly announced in the Gazette published by authority of the crown; and the Gazette is admitted in courts of justice as evidence of such acts.

Accordingly, in *Radcliffe v. United States Ins. Co.*, 7 Johnson's Rep., page 50, Kent, Chief Justice, held as admissible a letter of Mr. Canning to Mr. Pinkney, printed at the city of Washington by persons who were printers to Congress; the printed letter composing part of a set of public documents transmitted to Congress by the President of the United States. And to the same purport is the case of *Root v. King*, 7 Cowen's R., 613-36.

In *Talbot v. Seaman*, 1 Cranch, 38, a French decree was allowed by the Supreme Court of the United States, to be read, upon no higher proof, than that which attended the letter—in the New York case, *supra*.

In *Watkins v. Holman*, 16 Peters, 53, certain documents were offered, contained in a volume of State papers published under the authority of Congress. M'Lean, J., in delivering the opinion, said: "The volume of State papers offered in evidence by the defendants, we think should have been admitted. This volume was published under an act of Congress, and contained the authentication required by the act. Its contents are, therefore, evidence." He further remarked that "in this country, in all public matters, the journals of Congress, and of the State legislatures are evidence; and also the reports which have been sanctioned and published by authority. This publication does not make that evidence which, intrinsically, is not so; but it gives, in a most authentic form, certain papers and documents. In the case under consideration the volume of documents was offered

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“to show the reports of certain commissioners under an act of Congress conferring the title in question. Now, this original report, duly authenticated by the Treasury Department, to which it was made, would be evidence, and it is evidence in the *public volume*. The very highest authenticity attaches to these State papers, published under the sanction of Congress.”

In *Bryan, et. al. v. Forsyth*, 19 Howard, 334, it appears that, in the Circuit Court, the plaintiff offered in evidence the printed report of Edward Coates, the register of the land office at Edwardsville, as found in the American state papers, Vol. 3, from pages 421 to 431, inclusive; to which the defendant objected, because it was not without proof of its authenticity, legal evidence. The Circuit Court overruled the objection, and the report was given in evidence to the jury, to which ruling the defendant's excepted. Mr. Justice Catron, in pronouncing the opinion of the Supreme Court, says “these State papers were published by order of Congress, and selected and edited by the Secretary of the Senate and Clerk of the House. They contain copies of legislative and executive documents, and are as valid evidence as the originals are from which they were copied; and it cannot be denied that a record of the report of Edward Coates, as found in the printed journals of Congress, could be read on mere inspection as evidence that it was the report sent in by the Secretary of the Treasury.”

And in *Gregg, et. al. v. Forsyth*, 24 Howard, 179, Mr. Justice Campbell in delivering the opinion of the Supreme Court, reiterates the foregoing decision, adding that “the volumes of the American state papers, three of which were published by Duff Green, under the revision of the Secretary of the Senate, by order of the Senate, contain authentic papers which are admissible as testimony without further proof.”

As to maps stating boundaries they are receivable in evidence, provided it appears that they have been made by persons having adequate knowledge. And in the cases where they have been admitted, their admissibility has depended

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on the ground of their being *public documents*, or upon the other ground of their being in the nature of admissions. (1 Ph. on Ev., §§ 225-77.)

By the Act of Congress of June 23, 1874, chapter 456, the term "*public document*" is defined to be all publications printed by order of Congress, or either house thereof.

Title XLV of the Revised Statutes of the United States, relates to "public printing, advertisements, and public documents." It provides for a government printing office, congressional printer, and for a joint committee on public printing consisting of three members of the Senate and three members of the House of Representatives. Section 3779 declares that "whenever any charts, maps, diagrams, views or other engravings are required, to illustrate *any document* ordered to be printed by either House of Congress, such engravings shall be procured by the congressional printer, under the direction and supervision of the committee on printing of the House ordering the same.

By section 3781, the congressional printer may contract for the lithographing of the maps of the several States and Territories accompanying the annual report of the Commissioner of the General Land Office.

By the Act of Congress of June 20, 1874, the title of the congressional printer is changed to public printer; and he is deemed an officer of the United States, and is appointed by the President, by and with the advice and consent of the Senate. See also Act of Congress of July 31, 1867, chapter 246, pages 1045, under head of public printing.

The Act of June 23, 1874, chapter 455, makes an appropriation for engraving and printing the plates illustrating the report of the geographical and geological explorations and surveys west of the one hundredth meridian, to be published in quarto form, the printing and binding to be done at the government printing and binding office.

The Act of July 31, 1876, chapter 246, provides for "photolithographing and printing the large connected land map of the United States and Territories;" "for geographical surveys of the Territories west of the one hundredth meridian; and

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for preparing, engraving, and printing the cuts, charts, plats, and atlas sheets for geographical surveys west of the hundredth meridian." See also page 163 of pamphlet laws of Congress, session 1, 1876, chapter 287.

After careful consideration, the conclusion is reached that there was no error in the admission of the book, or of any of the maps, in evidence.

The question next to be considered is in reference to the defendant's objection, that no copy of the indictment was served upon him as required by law. In criminal cases, prosecuted under the laws of the United States, the accused has the constitutional right "to be informed of the nature and cause of the accusation against him." Amendment VI.

In *United States v. Miller*, 7 Peters, 142, this was construed to mean, that the indictment must set forth the offense "with clearness and all necessary certainty, to apprise the accused of the crime with which he stands charged."

The object of the indictment is first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and, second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.

In addition to the constitutional right of having the indictment read on arraignment, by section 1033 of Revised Statutes of the United States, any person indicted of any other capital offense than treason, is entitled to the privilege of having delivered to him a copy of the indictment and list of jurors and witnesses, at least two entire days before the trial.

This section is a substitute for a similar provision contained in section 29 of the Act of Congress of April 30, 1790; which, in its turn, seems to have been prompted by the Act of Parliament of 7 w 3, c 2, and 7 Ann. C., 21, § 11, relating to certain species of treason.

In England, as well as in this country, the furnishing of a copy of the indictment, etc., in such cases, has always been

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considered as a privilege attached by statute, and designed and created solely as an incident of the punishment to which the offense subjected the offender. The intention was, and is merely, for the sake of better enabling the person indicted to make answer by motion to quash, by demurrer, plea of former conviction or acquittal, or by other plea.

In England, by the common law, the prisoner upon arraignment, was bound to plead *instantly*; and how, without a copy, and without legal assistance, could he answer advisedly as to any defects or matters preliminary to the trial? To alleviate this hardship of the common law, the English Statute of Ann provided that the copy, etc., should be delivered ten days "before the trial," whilst ours prescribes "at least two entire days *before the trial*." As to the words "before trial," the English construction was, that this must be intended *before arraignment*, because the prisoner must plead instantly upon his arraignment, which was his time for pleading.

But in the case of *The United States v. Curtis*, 4 Mason, 232, it was held that the word *trial* in our act of 1790, means the trying of the cause by the jury, and not the arraignment and pleading preparatory to such trial.

Which of these constructions is finally to prevail, is of no material consideration in the present case; for on his arraignment before Mr. Justice BENNETT, on the 18th of October, 1876, the record discloses that after the indictment was read to him, "the court stated to defendant that he could plead then "to the said indictment, and was, at the same time, notified "and admonished that he could afterwards withdraw his "plea if he chose to do so, for the purpose of entering a demurrer, motion, or other plea." After this notification and full understanding, the defendant pleaded "not guilty." It is thus seen, that he was not then compelled to plead, but left to his option; but if he should do so, even in such case his pleading was not to be construed as a waiver of any of his rights, or attended with any prejudice thereto. The calling and impanelling of the jury did not occur until the 4th of December, forty-seven days after arraignment and plea; so that ample time and opportunity were afforded to withdraw

the plea, if deemed expedient, and to move to quash, to demur, or plead, *de novo*. At no stage of the proceedings during the interval between plea and the calling of the jury, or afterwards, did the defendant, or his counsel, ask, or intimate a desire, to withdraw the plea, for any purpose. No trial, judgment, or other proceeding on an indictment, can be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. (§ 1025, R. S. of U. S.) Moreover, the record shows that, on the 4th of December, the defendant being in court with his counsel, the U. S. Attorney moved "to proceed with the trial of the issue in this case; *and no objection being now made*, it is so ordered." And the record also shows that on a prior day, to-wit: the 1st of December, when a list of the jury and of the witnesses to be produced on the trial, was delivered to the defendant, the court informed him that he had "at least two entire days before the trial within which time to make any preliminary motion or plea."

The objection that no copy of the indictment was served upon the defendant as required by law, was first raised upon the trial, and after the prosecution had closed its testimony and rested its case. It is of a two-fold nature; first, that although a true copy was given to one of the defendant's counsel, on the 18th day of October, yet it should have been delivered to the defendant himself, and to no one else; second, that although another (alleged) copy was, on the first day of December, actually delivered to the defendant, personally, yet it was defective.

As to the first copy, the U. S. Attorney testified, that he delivered it to the defendant's attorney, in the presence of the defendant. On the other hand, the latter attorney, whilst admitting, in his affidavit, the main facts, states that his "*recollection* is that said copy was handed him after the case was over in court," (that day, the 18th of October), "and after the prisoner had been remanded."

By the letter of the statute, the copy is to be delivered to the person indicted. But as a main object of this law is to give the counsel for the accused a full opportunity of dis-

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covering defects in the indictment, as well as to enable them to make full defense, and as it is their duty to see that all the proceedings are regular, that the prisoner lose no advantage, and generally to advise him for his benefit; it is somewhat difficult to perceive how, in this case, the spirit of the statute has been disregarded. It might, indeed, be argued that the intent is better effectuated by delivery to the counsel, whose sworn duty it is to guard the rights and privileges of the accused, rather than by giving it to him personally; for, in the vast majority of cases, a defendant can find no other use for it, than to hand it over to his counsel, learned in the law.

As to the copy delivered to the defendant himself on the first day of December, it is manifest that it is variant from the original; and principally in this, that, strangely enough, it omits the Christian name of the person killed, wherever his Christian and surname appear in the indictment, and in each case adds words, not found therein, to-wit: "Whose Christian name is to said jurors unknown."

But irregularities may be waived, and will commonly be held to be waived, if the party entitled to complain of them shall take any subsequent step in the case inconsistent with an intent on his part to take advantage of them. If by pleading "not guilty," the prisoner waives an objection that the copy of the indictment delivered to him was defective, (as was held in *U. S. v. Cornell*, 2 Mas., 193), by how much more strength of reasoning is that objection waived when, after proceeding to trial and waiting until the entire evidence of the prosecution is in, and the government's case is rested, the objection is for the first time made?

In several English cases it was held, that no objection can be taken to the fullness of a copy, or to any defect therein, after the indictment has been pleaded to. (*Rockwood's case*, 4 State Trials, 646; *Foster*, chapter 111, page 230; 1 East, P. C. 113, citing *Gregg's case*, *Cook's case*, and others; *Bac. Ab.* 545, Tit. treason, cc.)

In *State v. Jordan*, Walk. 392, it was held that a plea of not guilty and proceeding to trial, is a waiver of the statutory



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privilege of having a copy of the indictment and venire two days before the trial.

In *Comm. v. Betton*, 5 Cush., 427, where a copy omitted certain words, and the trial proceeded without any objection being made to the sufficiency of the copy, it was held that the objection was thereby waived.

In Ohio an omission on the part of the State to furnish the accused with a true copy of the indictment at least twelve hours before trial, as provided by statute must, to be available, be interposed as an objection before trial; and if waived then, it cannot be made a ground of error after trial. (*Fouts v. The State*, 8 Ohio St. Rep., 98; *Smith v. The State*, 8 Ohio Rep., 294.)

In the report of the case of *U. S. v. Hare*, (2 Wheeler Cr. Cases, 283), tried at Baltimore, in 1818, the defendants, on arraignment, were told by the court that they must plead *instanter*, but that their pleas should not be considered with any prejudice to their rights, and might be withdrawn the next day if the counsel thought proper. The next day, their counsel did ask leave to withdraw the pleas, which was granted by the court, and they were withdrawn. Afterwards, on being told that they were to plead anew, the prisoners were again severally arraigned; and upon being asked whether they were guilty or not guilty, they stood mute and refused to answer. Thereupon the court ordered that the trial proceed by jury as if the prisoner had pleaded not guilty, in accordance with the act of Congress then in force. Accordingly when the clerk had commenced to call the jury, it was objected that no copy had been delivered at all, and the prisoner's counsel had no knowledge of the nature of the charge at the time of the arraignment, except what might be derived from hearing the indictment once read by the clerk. But the court after declaring that the whole proceedings had been strictly regular, and that they were satisfied they had given the prisoners all the privileges they were entitled to, ordered that the trial must go on; and a jury was called and sworn. This was tantamount to deciding that, under all the circumstances of the case, the prisoner had waived the priv-

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ilege of a copy. And in furtherance of this view, it is stated by Chitty (Criminal Law, Vol. 1, 405) that if the prisoner plead without having claimed these statutory advantages, or when they have been imperfectly granted, he cannot afterwards take advantage of the defect, for his pleading has cured the objection.

To conclude, a true copy of the indictment in the present case, was delivered to counsel of defendant (and in his presence, as positively sworn to by the U. S. Attorney), forty-seven days before the trial; secondly, a defective copy was delivered to the defendant himself, three days before trial; thirdly, the plea of the 18th of October, could have been withdrawn during the interval, for any advantageous purpose, but no attempt to do so was made—the defendant and his counsel thereby tacitly acquiescing (after abundant time for deliberation) in the propriety and wisdom of the original plea; and lastly, the defendant, without making any objection, went to the jury on that issue.

By having entered upon trial, and by having waited until the prosecution closed its case, the defendant was too late to make the objections referred to, concerning these copies; for, by such conduct and acquiescence, he virtually admitted that he had a copy sufficient for all the purposes intended by the act of Congress.

As to the objection that the defendant should have been indicted and tried on the other side of this court, it is well settled that a trial for homicide committed in an Indian reserve, must be had on the Federal side of a Territorial court, and is governed by U. S. statutes and the rules of the common law.

Perceiving no error as to the other objections, and there being no exception or complaint to the law as charged by the court below, it is, therefore, this day—the 19th of January, A. D., 1877,—all the said premises and the record being, by the whole court, here, fully known and considered, *adjudged*, that the judgment of the said District Court be, and the same is hereby affirmed in all respects; and the cause, with the record, is remitted to that court, with the order that the said judgment therein rendered be executed.

All the Justices concurring.

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## CHEATHAM V. WILBER, ET AL.

1. **CONTRACT: RECIPROCAL CHARACTER: CONSTRUCTION.** A contract should not be so construed as to destroy its reciprocal character, or leave its enforcement to the option of one party, to the damage and detriment of the other.
2. ———: **DILIGENCE: DEFENSE.** Under a contract stipulating for the deposit of evidences of indebtedness with a third party until the title to property for which they were given has been made good, the debtor will not be permitted to stand idly by and see the property carried off by a stranger without in any manner asserting his legal rights, and when suit is brought on the instruments so deposited, plead such trespass as a defense to the action.
3. **INSTRUCTIONS: ERROR: WHEN REVIEWED.** Alleged error in the giving or refusing an instruction will not be reviewed by the Supreme Court, unless all the instructions given by the court on the same branch of the case are embraced in the record.
4. ———: **EXCEPTION: WHEN TAKEN.** Appellate courts will not consider exceptions to instructions which were not taken at the time they were given, or at least before verdict unless further time has been given by the court.\*

*Appeal from Yankton County District Court.*

ON the 23d day of March, 1874, defendant Wilber executed and delivered to plaintiff one promissory note for \$150, due July 15, 1874, and one order drawn on defendant Marsh for \$150, payable ten days after date. The order was accepted by Marsh, who also signed the note as guarantor.

This suit is brought to recover upon these instruments. The consideration was the transfer by Cheatham to Wilber, of certain horses, vehicles, &c., used on a stage line in the State of Nebraska. The execution and delivery of the note and order are admitted, and defendants rest their defense mainly on a certain contract, subsequently entered into by and between Cheatham and Wilber, and which is in the words and figures following, viz.:

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\*Since this decision was rendered the Legislature has changed the rule by a provision in section 249, Code of Civil Procedure, which reads as follows: "Exceptions to the giving or refusing any instruction or to its modification or change may be taken at any time before the entry of final judgment in the case."

REPORTER.

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"YANKTON, March 30, 1874.

"It is hereby understood and agreed by and between C. Cheatham and R. H. Wilber, of the State of Nebraska, that one order on James Marsh for one hundred and fifty dollars, payable to said Cheatham, and one note for one hundred and fifty dollars, payable to said Cheatham, and both signed by said R. H. Wilber, shall be deposited with D. T. Bramble, of the city of Yankton, upon the following conditions: If the said Cheatham shall make the title good to seven horses, two spring wagons, one buckboard, two set of double harness, and one set of single harness, as described in a bill of sale under date of March 17th, 1874, from P. Jones to said Cheatham, and since sold by said Cheatham to said Wilber, and which property is claimed by Clarence VanTassel, of the said city of Yankton, then the said order and note shall be delivered to said Cheatham, otherwise to said Wilber."

(Signed.)

"C. CHEATHAM,  
"R. H. WILBER."

Defendants also allege in their answer false and fraudulent representations by Cheatham made in the transaction; failure of consideration, and property in VanTassel. They also plead a counter claim of fifty-seven dollars, being, as alleged, ten dollars paid on the order, and money paid to other parties to discharge liens on the property transferred, for keeping, etc., all of which is denied by plaintiff in his replication. The above contract is admitted, and referred to in the pleadings by both parties, although not correctly set out by either. The cause was tried to a jury, and a verdict returned for plaintiff. Motions in arrest of judgment, and to set aside the verdict and for a new trial were made and overruled, and judgment rendered for plaintiff. Defendants appeal.

*G. C. Moody and Oliver Shannon, for appellants.*

The plaintiff was not the owner and *holder* of the note and order sued upon when he brought this action. They had been deposited by agreement with D. T. Bramble to be retained by him until the plaintiff should *make the title good* to the property in dispute for which the note and order had been made, and which property the plaintiff admitted *in the agreement*, was claimed by VanTassel. Now, certainly this agreement meant *something*, and we submit it meant that before plaintiff should have the right to the *possession* of the note, and therefore before any right of action could accrue to

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him he must relieve and discharge this property from the claim of VanTassel; and if VanTassel brought suit to recover the possession, he (plaintiff) must successfully defend the title, or if he took possession without suit, as he did, plaintiff must recover the same. In other words, having warranted title by the sale he took upon himself the active burden and expenses of establishing and defending such title. This could only be done successfully, and he could only make his title good against VanTassel's *claims* by either buying him off, or by action in which VanTassel was a party. Any other construction of the instrument would make it simply nonsense and mean nothing; for if this question could be tried, and the title made good against VanTassel's claims, in a suit in which VanTassel was not a party, then the agreement had no force whatever; for in a suit by Cheatham upon the note and order the defendants could set up want of consideration and prove that Cheatham had no title that was in VanTassel. Courts cannot thus ignore the express contracts of parties, and say they impose no obligation when the party has expressly taken upon himself the obligation of doing something, as in this case. It is not an answer to say that Cheatham fulfilled his contract by showing *in this case* that he had a good title to the property as against VanTassel, for this puts the burden upon Wilber of doing precisely what, by the agreement, Cheatham agreed to do, to-wit: bring a suit against VanTassel or do some other act to make Cheatham's title good to said property. VanTassel took possession and retains it; and if Wilber is compelled to pay this note and order he still will be obliged, in order to make himself whole, to bring suit against VanTassel and show that Cheatham's title was *a good one*, precisely what Cheatham in the agreement was to do before he could get possession of the note and order at all, and therefore before he could sue upon them. Therefore the instruction asked for was proper and ought to have been given. But the instruction asked for was good law, pertinent and applicable to the case, even if it was not a condition precedent that Cheatham should make his title good against VanTassel's claims, for certainly it was

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necessary for the jury to be satisfied that Cheatham had made his title good to this property, either in this suit or some other way, before he could recover. And it was error to refuse it in any view that can be taken of the agreement.

Again, there is an entire failure of proof. The plaintiff alleges one contract, and another and entirely different contract is shown. There was no amendment or offer to amend the complaint to conform to the proof.

It was clear error to exclude the proof of lien against this property. And anybody who knew the facts could as well testify thereto as the *station keeper*.

If this written agreement is ignored as plaintiff claims, and the court held it should be, still the facts remain that the property for which the note and order were given, was sold by Cheatham to Wilber, that Cheatham warranted the title to Wilber, and if liens existed against it which Wilber was compelled to pay before he could get possession, the amount which he paid would be a valid counter claim against the amount due on the note and order. And such counter claim was plead—was offered to be proven, but all evidence thereof was excluded unless we would produce one particular witness to prove it, to-wit: the *station keeper*, although a hundred others might have known the fact just as well, and could testify thereto just as positively.

*Gamble Bros. and Powell*, for appellee.

This action was properly brought in the District Court. The plaintiff was not obliged to commence any separate action or actions to determine his rights in the premises, or to settle the title to the property in question, before recovering on the note and order in suit. He may "unite in the same complaint several causes of action, whether they be such as "have been heretofore denominated legal or equitable, or "both, where they all rise out of the same transaction or "transactions connected with the same subject of action." (Code of Civil Procedure, § 120.) The subject of this action was the note and order sued upon. The contract of March

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30, 1874, is a transaction connected with the same subject, to-wit: whether there is or is not any consideration for the note and order sued upon, which goes to the foundation of the cause of action.

But even if there was an improper joinder of different causes of action in this case, an objection thereto came too late upon the trial. If several causes of action have been improperly united, objection for such reason must be raised either by demurrer (Sec. 97, sub. 5, Code of Civil Procedure) or by answer. And if such objection is not then taken it is forever waived. (Ibid, § 101.) The defendants did not demur and raised no such issue in their answer. The defendants had full notice of what the plaintiff claimed set out in the complaint. They answered on the merits, setting up a failure of consideration for the reason the plaintiff was not the owner of the property in question, and that VanTassel was the owner thereof. The issue as to VanTassel's title was voluntarily raised by defendants' answer. The Judge below properly overruled the defendants' first objection to the reception of the evidence on the trial, and properly allowed the plaintiff to introduce evidence on all the issues in the case. Besides the defendants voluntarily called VanTassel and other witnesses to prove his title to the property and thereby defeat the plaintiff's recovery. The jury, after hearing all the evidence on the issues, found for the plaintiff on all the issues:—that VanTassel had no title as against the plaintiff, and that the plaintiff had made good his title to the property.

The defendants had no right to complain in the middle of the trial and avoid the trial of issues they had voluntarily raised, much less could they do so at the close of the testimony which they had voluntarily submitted in the form of a request to charge the jury, or otherwise, which request was properly refused for the above reasons. Besides the whole question raised in the request was fully and fairly submitted to the jury, both as to whether the plaintiff had made good his title to the property, or what was the same—the validity of VanTassel's title to the property, as against the plaintiff. See "Notes of Charge."

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The Judge properly refused to allow the witness VanTassel to answer the question—"How long did you continue to own the property, etc." The question was clearly leading and improper, and assumed as a fact a leading issue in the case, to-wit: the ownership of the property. The court allowed all the facts and circumstances attendant upon the witness's alleged purchase and ownership to be given in evidence, but properly refused this manner of examination. No evidence was excluded as to VanTassel's title and ownership, and the matter was fairly submitted to the jury, both at this time on the trial and also again in the Judge's charge. (1 Greenleaf's Evidence, § 434 and 434 a\*; 2 Phillips' Evidence, page 889\*; 2 Phillips' Evidence, page 889, note 572.) The defendants offered in evidence the contents of a letter alleged to have been written by the plaintiff's vendor to the plaintiff, and also offered to prove declarations of said vendor, before the sale and while in possession, to third parties. The evidence in both instances was properly excluded by the court. The declarations of a former owner of chattels are not admissible in evidence, either to defeat or establish the title of the same in his vendee. The rule is the same whether made before or after the vendor parted with the possession and title. (*Page v. Cagwin*, 1 Hill, 379; *Wordel v. Parmlee*, 1 N. Y., 519; 2 Wait's Law and Practice, 376 and 1168; *Cahoon v. Marshall*, 25 Cal., 197 at 202; *Hurd v. West*, 7 Cowen, 752 at 759; *Donaldson v. Johnson, et. al.*, 2 Pinney, 482 at 486; *Bogart, et. al. v. Philips*, 14 Wis., 88 at 95.) The evidence offered by the defendants in support of their alleged counter claim was properly excluded. The alleged payment to the station keeper, McCleggett, was for an alleged lien or incumbrance on the horses as set up in defendants' answer. The defendants before they could recover on their counter claim were obliged to prove by legal and sufficient evidence:—

1. That the amount claimed to be set off was actually due the station keeper; and
2. That the said station keeper actually had a lien for the amount due under the laws of the State of Nebraska, or by mortgage or otherwise.



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The plaintiff was clearly in no manner bound by the fact that the defendant was compelled to pay the station keeper \$25 to get possession of the horse, unless that was the amount due him and that he had a lien therefor, and for the same reason what it was worth to keep the horse and the time it was kept there, was improper evidence for the jury. The fact that the station keeper claimed a certain amount due is clearly hearsay. The plaintiff objected to the reception of such evidence unless it was followed up by proof of the amount due by some one who knew the fact, and also by proof of a lien. This the defendants neglected and refused to do, and the court thereupon excluded the evidence. The court had a clear right to compel the defendants to include in their offer sufficient and competent evidence to support their counter claim, and if they fail to do so to exclude the part offered entirely. (1 Phillips' Evidence, 732,\* note 195; 1 Phillips' Evidence, 737,\* note 196.) *There is no error in the charge of the Judge; but even if there was, such error is not before this court for review.* The record discloses that no exception or notice of exception was taken to the charge on the trial, or before verdict, and none even was suggested to the court until nine days after the jury had rendered their verdict and been discharged. Such offered exception came too late and can in no manner bring the charge up to this court for review.

An exception to the Judge's charge should be made immediately upon its delivery, *and in all cases must* be made before the jury have delivered their verdict. To this rule there is certainly no exception either at common law or under our Code, and the same universal rule prevails in all the "Code" States, as far as we can find. (Code Civil Procedure, D. T., § 217; Code Civil Procedure, N. Y., § 264; *Lanouse v. Barker*, 7 Johnson, 312\*; *Life & Fire Ins. Co. v. Mechanics Ins. Co.*, 7 Wend., 31; *Camden, etc., R. R. Co. v. Belknap*, 21 Wend., 354 at 359; *Greegs v. How*, 31 Barb., 100; *Boran v. Martin*, 2 Pinney, Wis., 401; *Hicks v. Town of Marshall*, 24 Wis., 139; Revised Statutes of Wis., 1858, chap. 132; *Hicks v. Coleman*, 25 Cal. at 146; *Brown v. Hurch*, 3 Neb., 353 at 356; *Doe v.*

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*Brown*, 6 Ohio St., 12; *Kline, et. al. v. Wayne, Hayne & Co.*, 10. Ohio St., 221; *Snyder v. Eldridge*, 31 Iowa, 129; *Armstrong v. Pierson*, 15 Iowa, 476; *Slate v. Clark*, 37 Vermont, 471; *Estus' Pleadings*, page 502, and cases cited.) The only cases in which exceptions are allowed after trial are on trials by the court or referees and without a jury. (Code Civil Procedure, D. T., § 220; Code Civil Procedure, N. Y., § 268.) And in such cases exceptions after trial are only allowed to the findings of fact and conclusions of law. Error committed at such trials must be excepted to at the time. The intention of the Code being to give the right of exception afterwards when it cannot be done at the trial, for under the Code no opportunity is allowed to except to such findings of fact and conclusions of law till after trial. (*Hunt v. Bloomer*, 13 N. Y., 341 at 342; *Johnson v. Whitbeck*, 13 N. Y., 344 at 347.) But even if the Judge's charge was properly before this court for review there is clearly no error in the charge. Only that part of the charge which was reduced to writing is here. What is not here is presumed to be correct and to explain the part that is here. None of the testimony of the witnesses on the trial appears in the bill of exceptions or case. The charge is presumed to be made on the facts, and presumed to properly apply to those facts in evidence, unless the contrary appears from the case here. And the testimony of the witnesses not appearing in the case the defendants cannot go behind the charge and insist there is error in the charge on the facts in evidence. Besides, the Judge's charge could not have misled the jury. It states briefly certain facts in evidence and insisted upon by the parties. The Judge then reads and states the statute just as it is, without a word of alteration, and only goes outside of the words of the statute to explain what is meant by "good faith." And this explanation is certainly very favorable to the defendants. (Civil Code, § 1919.)

BENNETT, J.—Numerous exceptions were taken during the progress of the trial and presented by the record, but they all seem to have been abandoned on the argument except two, and these only do we deem it necessary to notice:

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*First*—Did the court err in refusing to instruct the jury as requested by the appellants; and

*Second*—Was there error in excluding the testimony offered by appellants in support of their counter claim.

According to appellants' theory, and their construction of the contract of March 30, plaintiff could not maintain an action on the note and order, and defendants could not be liable thereon until plaintiff had, by some sort of action by him brought directly against VanTassel, or in some other manner, settled the question of VanTassel's claim to the property. On this theory they asked the following instruction:

"If the jury believe from the evidence that said plaintiff and defendant Wilber entered into the agreement in writing of date March 30th, 1874, to deposit said note and order with D. T. Bramble, and that it is still in full force and virtue, then before the plaintiff can recover in this action he must satisfy the jury from the evidence that he has made good his title to said personal property mentioned and described in said agreement, and especially as against said Clarence VanTassel."

The court below in refusing this instruction, says: "This means that the plaintiff cannot recover in this action until by a separate action of some kind he shall have first established his title to the property he sold to Wilber as against Clarence VanTassel." We think the court took the correct view of this instruction under the pleadings, and very properly refused it.

We cannot give to the contract the construction contended for by appellants. If we should, we would be greatly embarrassed in endeavoring to define the kind of action to be brought by Cheatham against VanTassel for the purpose of settling the rights of VanTassel to the property. Cheatham had disposed of the property absolutely—had no interest in it, nor right of possession; and any action he might have brought would have been dismissed on motion, as being instituted and prosecuted by a mere stranger and intermeddler. He was, therefore, unable to bring a suit. VanTassel had no object in bringing one, for he, as appears from the plead-

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ings, possessed himself of a portion of the property without the aid of legal proceedings. The property had been sold, and its possession transferred to Wilber; what was then his duty in the premises? Could he quietly acquiesce in the forcible seizure of the property by VanTassel, take no legal steps for its recovery, or to enforce his rights as against VanTassel, and then plead the trespass of VanTassel as a defense against the payment of the note and order? Suppose he had paid the cash for the property, and taken from Cheatham a special warranty, what would have been his standing in court in an action to recover back the purchase price or for damages arising from a breach of the warranty without first having litigated VanTassel's right to the possession of the property? The property was taken by VanTassel about the first of July, 1874, as appears from the record, and this action was commenced some time in February, 1876; and during all that time Wilber seems to have been wholly indifferent—took no steps to assert his rights or to recover possession, and from that indifference and failure on his part to assert his rights, we are warranted in concluding that he was entirely willing that VanTassel should keep what property he had, if thereby he, Wilber, would be excused from paying the note and order. And may we not further conclude that the jury found the allegation in the complaint to be true, "that VanTassel acted in collusion with defendant Wilber, in obtaining possession of a part of said property in the night time, and bringing it across the Missouri River to this Territory."

The most reasonable construction to be placed on this agreement, and the only one, in my view, consistent with an honest purpose on the part of both parties is to regard it in the light of a special warranty against the claims of VanTassel; and the object and purpose which the parties had in placing the note and order in the hands of D. T. Bramble, were to prevent their negotiation before maturity, and thereby save to defendants any defense which they might have against their payment, growing out of a failure of consideration or breach of the warranty. Any other construction destroys the mutuality and reciprocal character of the agreement and

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places it within the power of Wilber to postpone indefinitely the payment of the note and order.

Now, when suit is brought on this note and order, what in all good conscience, and within the spirit of this agreement, are defendants' rights? To do just what they have done, plead a failure of consideration, and property in VanTassel; or in other words a breach of the special warranty. The question of title to the property was fairly put in issue by the pleadings, and if the jury had found that VanTassel was the owner of the property at the time of its transfer from Cheatham to Wilber, then they could not have found for plaintiff. Defendants put this question of title in issue by their pleadings, and it has been found against them; what cause then have they for complaint? So far as the pleadings show, the only thing that could defeat plaintiff's right to recover would be the failure of title in him, or the fact of title being in VanTassel at the time of the transfer; and I am wholly unable to discover why this cannot be determined as well in an action on the note and order as in a separate suit against VanTassel. It is, however, insisted that this instruction was proper and should have been given, even under this view of the case. All the instructions given by the court are not before us, and in their absence we must presume that the jury was properly instructed on this branch of the case.

We come to notice briefly the second point, viz.: was there error in excluding the evidence offered by appellants in support of their counter claim. This testimony, as shown by the record, is as follows:

"The said Wilber being on the stand, testified further that he paid twenty-five dollars at Lime Creek, Nebraska, for keeping stock and *boarding drivers*. And David McConahan, another witness for the defendant, having also testified that he settled part of the bill at Lime Creek, Nebraska, and that he thought it was twenty-five dollars, and that the charge was for taking care of the horse. And the said defendants stating their object to be to prove by said witness in support of their counter claim for payment of charges, and lien upon one of the horses included in the sale by plaintiff to Wilber,

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the said horse was kept at Lime Creek, Nebraska, by the station keeper McClaget, for several months, and offering to show what said keeping was worth and that said station keeper had said horse in his possession, and would not allow it to be taken away without the payment of his charges and claim to the amount of twenty-five dollars, and that said defendant Wilber paid the said station keeper McClaget the said twenty-five dollars, and was compelled to in order to get possession of said horse. And thereupon the said plaintiff by his attorneys having objected to the reception of all evidence of said claims and lien for keeping said horse, and the defendants' attorneys having further asked the witness on the stand how long the horse was kept at Lime Creek, and how much it cost to keep him, and the plaintiff having objected to all such questions, and to the reception of any evidence in relation thereto, as being illegal and irrelevant, and objecting that defendants should produce said station keeper and prove by him the lien, if any, on said horse, the court sustained the plaintiff's said objection."

If all this evidence had been admitted, with all that was proposed in the offer, it certainly could not be urged as sufficient to support defendants' counter claim. It might have tended if followed up and connected by the proper testimony, but standing alone it was wholly insufficient, and there was no offer to so connect it. Admitting that the horse was kept for a certain period of time, and that such keeping was worth twenty-five dollars, and these facts had been shown beyond a peradventure of doubt, would that have authorized a recovery on the counter claim without showing that the lien still attached at the time, and that the charge for keeping was a justly subsisting indebtedness, due and unpaid? I certainly think not. And how did the defendants propose to show this? Simply by proving the declarations of McClaget, the station keeper, made to third parties. That is nothing more nor less than hearsay, and under no circumstances, such as surrounded this case, could be deemed competent or admissible. The evidence standing alone was clearly irrelevant, and the court was right in excluding it, unless the defendants

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in proper manner offered to connect it by proper testimony, and even then it would be in the discretion of the court. Defendants might be required to introduce first their evidence establishing the lien, contract for keeping, and that the debt was still due and unpaid. It is claimed that the objection was sweeping, and precluded them from introducing any testimony in support of their counter claim. Taking the record all together we cannot put that construction on it. Plaintiff's objection concludes by stating "that defendants should produce said station keeper and prove by him the lien, if any, on said horse." This was reasonable and just. The witnesses had already testified that they settled with the station keeper McClaget, and paid him the money; he was the man who, as alleged, had kept the horse, boarded the drivers, claimed the lien, and demanded pay before he would permit the horse to be taken away. Is it not clearly made to appear that his testimony would have been the best evidence, and should, therefore, have been produced, unless it was not in defendants' power, and this they do not claim. It is insisted that any one knowing the facts in relation to the counter claim could testify as well thereto as the station keeper. That is certainly correct; but as appellants did not produce or offer to produce any such witness, its consideration becomes immaterial.

There are one or two questions of practice presented by this appeal which deserve attention, and I shall content myself with a simple statement of what I conceive the rule to be without discussion. I regard it as well settled that appellate courts will not consider exceptions to instructions which were not taken at the time they were given, or at least before verdict, unless further time has been given by the court. The reason of the rule is too obvious. If the Judge has erred, his attention should be called to it in season to correct it, without being compelled to set aside a verdict, and put the parties and the court to the expense and trouble of a new trial. And a party should not be permitted to sit quietly by, with full opportunity of knowing and correcting the error, but saying to himself, if the verdict is in my favor I am con-

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tent, if not, I have the means of setting it aside. "All good fidelity to the court" certainly requires that the exception be taken before verdict, and if not so taken it shall be deemed waived.

Neither will an appellate court consider an isolated instruction, unless it appear from the record that it was the only one asked or given on the particular point to which it relates. As a general thing it is very difficult to determine the correctness of the ruling of the court below in giving or refusing an instruction, unless all the instructions given as well as those refused, on any one branch of the case are before us. And this, in every case, is the better practice.

Not finding any error in the rulings of the District Court, the judgment is

**AFFIRMED.**

SHANNON, C. J., concurring.

BARNES, Asso. J., dissenting, except on the questions of practice.

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COUNTY OF YANKTON V. FAULK.

1. *FINES: PROCEEDS: APPROPRIATION.* It is within the power of the Territorial Legislature to provide that all fines, penalties and forfeitures for any criminal offense committed within an incorporated city, shall, when collected, be paid into the city treasury of such city, to the credit of the Board of Education, a body corporate created by special charter, to control the public schools within such city.

*Appeal from Yankton County District Court.*

LARGE sums of money having been paid into the District Court of Yankton county, and in the hands of the clerk, A. J. Faulk,—the proceeds of fines imposed by said court upon parties convicted of crimes and misdemeanors committed within the City of Yankton, said county, mostly arising under the statute regulating the sale of intoxicating liquors—were claimed both by the county and by the Board of Education of the City of Yankton, a body corporate created by



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special charter to control the public schools of said city; and the county officials and officers of said Board, respectively, claimed and demanded said funds of the clerk. In order that the clerk might be directed in the disposal of said funds, two agreed cases were made between the county and the clerk, under the provisions of section 294, Code of Civil Procedure, (section 718, New Code) in which the Board of Education was permitted to intervene. The matter was heard in the District Court, and judgments entered, *pro forma*, in favor of the county, from which the Board appealed.

The statutes governing the matter in controversy are referred to in the opinion, and the two cases, for the purposes of the decision, are treated as one.

*Bartlett Tripp*, for appellant.

*Phil K. Faulk*, District Attorney, for the county.

SHANNON, C. J.—The record shows that the Board of Education of the City of Yankton, claiming the fines in controversy, was made a party; and the case was submitted to the District Court, without action, under the provisions of section 294 of the Code of Civil Procedure. Upon the facts as agreed upon, the District Court, deeming it proper that the opinion of this court should be obtained, directed that *pro forma* judgments should be entered against the defendant and in favor of the county of Yankton, and that the defendant be ordered to pay the moneys to the treasurer of the county for the use of the common schools therein.

From these *pro forma* judgments the Board of Education appealed, and we are thus called upon to decide to which party the defendant is justifiable in paying over the funds held by him. He is, of course, bound to pay only to the party that has the legal right to receive.

By the act relating to Criminal Procedure of 1862, section 170, all fines were to be paid into the treasury of the county, for the use of the county, unless otherwise specially directed. It was afterwards specially provided by act of January 8, 1868, (chapter XXX, section 8) that money collected for fines

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for illegal sales of spirituous liquors, should, except taxable costs, be paid to the treasurer of the proper county for the use of the common schools therein. Such net moneys were thus directed from general purposes to a particular use.

Upon careful investigation it now appears that the above disposition of said fines, as contained in section eight, continued to be the law on the subject until the session of 1874-5, notwithstanding the legislative opinion to the contrary.\* At the last named session (pages 32-3, chap. XXI, § 2), conceiving that section eight of the old law had in some way been repealed, the Assembly revived and re-enacted it.

The laws as to the disposition of fines thus stood, with certain modifications not essential in this case to be noticed, until the act of January 6, 1875, by which the Board of Education for the City of Yankton was created. By section 27 of said act it was declared that "all fines, penalties, and forfeitures, for the violation of any city ordinance of said city, and all fines, penalties and forfeitures, *for any criminal offense committed within said city*, shall, when collected, be paid by the officers receiving the same, into the city treasury to the credit of said Board of Education, and subject to their order as other moneys raised pursuant to the provisions of this act."

Does this section give the Board the right to claim and receive the moneys in controversy? The offenses upon which these defendants were convicted, were committed within the city, although prosecuted in the District Court at the expense of the county. But no matter what our views may be as to the policy or wisdom of diverting funds for the general use of public schools, or for the general use of a county, into the hands of a particular corporation or district, we must unhesitatingly adopt the rules and maxims of interpretation applicable to the case. We must construe this section, in connection with previous enactments on the subject, by what is contained in it, in clear and precise terms, and not go elsewhere in search of conjectures in order to restrain, extinguish, or elude it.

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\*A Legislature cannot authoritatively interpret, or declare what the law is, or has been, but only what it shall be. See Potter's Dwaris on Statute, page 111 note 8.

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We must, therefore, decide that the moneys collected, after deducting taxable costs of the prosecution not paid by the defendants, be paid by the defendant into the city treasury to the credit of the Board of Education.

The judgments of the District Court are accordingly reversed, and judgment is directed to be entered against the defendant, in each case, and in favor of the Board of Education of the City of Yankton, and the cause is remanded with directions to proceed according to this opinion.

Justice BENNETT present and concurring.

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1	375
46*	456
46*	590

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WALDRON V. THE C. & N. W. R. R. Co.

1. **JURY: VERDICT: ISSUES SETTLED.** All disputed facts are determined by the jury, when they find for the plaintiff on all the issues; and their decision upon such facts should stand, unless there is insufficient evidence to warrant their finding.
2. **RAILROAD COMPANY: COMMON CARRIER: LIABILITY.** A railroad company as a carrier of passengers, is bound, unless there is reasonable grounds for refusal, to take all persons who apply for passage, and their baggage, not exceeding the number of pounds prescribed by the rules of the company, and to take the same when offered for transportation by the accompanying passenger.
3. ———: ———: ———. Such company is responsible, when duly delivered and accepted, for the safe conveyance and delivery of such baggage and packages, to and at the point for which they are destined, unless prevented by an act of the public enemy, by act of law, or by an irresistible superhuman cause.
4. ———: ———: ———. If property is offered with the passenger, but not so packed as to assume the outward appearance of ordinary baggage, or so as to deceive or conceal its true character, it is within the scope of the agent's business and duty to decide whether the company will receive and carry it as baggage, and if so received to be forwarded, the company is liable.
5. ———: ———: ———. A delivery to a duly authorized agent of a common carrier, who is in the habit of receiving packages, is a sufficient delivery.
6. ———: ———: ———. Where the defense is that a delivery was made to an agent of the owner, or consignee, it must be clearly proved that the person to whom the goods were delivered as agent was duly authorized as such. The carrier is under as much obligation to deliver property to the right person as he is to deliver it in a reasonable time and at the proper place.

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7. ———: ———: ———. If the delivery by a carrier be to the wrong person, although it be entirely by mistake, or by gross imposition, or upon a forged order, the carrier will nevertheless be responsible for the value of the goods lost.
8. **JURISDICTION: HOW ACQUIRED: PROVISIONAL REMEDY.** A court can acquire a limited jurisdiction in an action by the allowance of a provisional remedy; but jurisdiction does not become complete until the service of a summons in some of the modes prescribed by law, or by the voluntary appearance of the defendant.
9. ———: ———. **VOLUNTARY APPEARANCE.** A voluntary appearance by the defendant is equivalent to personal service of the summons upon him; and after such appearance the court acquires full jurisdiction for all purposes whatsoever.
10. **ATTACHMENT; CHARACTER OF PROCESS.** The attachment, under the Code, is not original process, and by it an action is not commenced, nor upon it alone can judgment be obtained. The action is commenced by summons, and the attachment is an adjunct, and can only be employed in an action already commenced.

*Appeal from Yankton County District Court.*

ALL the facts in this case, necessary to a full understanding of the points discussed and decided, are stated in the opinion.

*Oliver Shannon*, for appellant.

The language of the act, section 157 of Justices' Code, is this:—Any "*creditor*" shall be entitled against his *debtor* to proceed; and section 158 provides for the affidavit of plaintiff as to the amount of "*indebtedness*," etc.

The New York Code, section 227, which is the same as our section 180, and which is similar to the sections above of Justices' Code as to debtor and creditor, is confined to actions of contract involving *indebtedness* and not damages sounding in tort; for by the case of *The Atlantic Mutual Ins. Co. v. McLoon*, page 27 of 48 Barb., it is expressly decided that proceedings under attachment will not lie for negligence of a common carrier for loss of goods, because the cause of action is one sounding in damages, being in the nature of a *tort* and not *debt*.

The same principle as to unliquidated demands applies to cases in equity for amounts not ascertained by a previous

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accounting. (Wait, 133; 9 Bosw., 601; 20 How., 93; 11 Abb., 345; 18 Abb., 291; for definition of *debtor*, see Civil Code § 1913 )

**AUTHORITY ON AGENCY: OSTENSIBLE AGENCY.**—Civil Code, §§ 1249, 1253, 1221; Wharton on Agency, §§ 43, 111, 40; Story on Agency, § 85.

**TERMINATION OF AGENCY.**—Civil Code, § 1262; Wharton on Agency, § 455; Story on Agency, § 84.

If the powers are special, they form the limits of authority; if general, they will be more liberally construed, according to the necessities of the occasion, and material or ordinary or reasonable cause of the transaction.

Revocation of agency takes effect as to third parties when it is made known to them; not before. (Story on Agency, §§ 470 and 473.

#### ON THE QUESTION OF LUGGAGE.

Common carriers of passengers are bound to transport the ordinary baggage of their passengers; but this liability is limited to ordinary baggage, consisting of such articles of necessity or convenience as are usually carried by passengers, and does not include merchandise or other valuables not designed for any such purpose. (*Miss. Centl. R. R. Co. v. Kennedy*, 41 Miss., 671; *Cinn. & Chic. R. R. Co. v. Marcus*, 38 Ills., 219; *Smith v. Boston & Maine R. R. Co.*, 44 N. H., 325.) This last case defines "ordinary baggage" to be "articles required for the personal accommodation of the passenger upon his journey." (*Collins v. Boston & Me. R. R. Co.*, 10 Cushing, 506; *Stinson v. Conn. River R. R. Co.*, 98 Mass., 83.) In a recent case in New York the rule is laid down to be, "carriers of passengers are responsible for the carriage and safe delivery of such baggage as by custom and usage is ordinarily carried by travelers for their personal use." (*Dexter v. Syrac., Bingham & N. Y. R. R. Co.*, 42 N. Y., 326; *The Gt. North R. R. Co. v. Shepard*, 8 Excheq., 30.) In this case these pictures were carried evidently for the purpose of advertising the business of plaintiff. The law is well settled that that which is carried for the purpose of business would not come within the description of ordinary baggage. In *Neaxson v. Gt. Western Railway* Law Rep., 6 Queen's Bench 612, 3 Albany Law

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Journal 476, 24 Law Tenn. Rep. 618, the rule was thus stated by Cockburn, C. J.: "Personal luggage is that which a passenger takes with him for his personal use and convenience on the trip, and does not include articles carried for the purpose of business."

In relation to the question of agencies, the following cases are in point: *Phil. & Wilmington R. R. Co. v. Weaver*, 34 Md., 430; *St. L. & N. Packet Co. v. Parker*, 59 Ills., 23; *Tomlinson v. Holt*, 49 Cal., 311; *Kelly v. Fall Brook Canal Co.*, 4 Hun. (N. Y.) 261; *Kerslake v. Schoonmaker*, 3 Thompson & Co. (N. Y.) 524; 1 Hun. (N. Y.) 436; 1 Parson's on Contracts, 44 and 69.

"Baggage is clothing and articles designed for personal use of a traveler." 42 N. Y. (3 Hand) 326. In section 1144 of Civil Code, "luggage" (as defined) "may consist of any articles intended for the use of a passenger while traveling, or for his personal equipment." Webster defines *baggage* to be—"The trunks, carpet bags, valises, hand boxes, &c., used to contain the clothing and other necessities or conveniences which a traveler carries with him on a journey." The ticket of a passenger includes also the *ordinary* baggage required for his *personal accommodation* upon his journey, but does not include merchandise. In the 8th Am. Law Reg., page 399, the Court say: "The fare of the passenger covers the compensation for the freight of the baggage. The baggage must be *ordinary* baggage, such as a traveler takes with him for his personal comfort, convenience, or pleasure for the journey." It must be the "ordinary baggage of a traveler, regard being had for the journey proposed."

The foregoing authorities suggest this distinction between travelers or passengers on a journey.

The case at bar is not in that category. The plaintiff was a traveling concert troupe, on business, not on a *journey*, and attempted to carry that which was necessary for their business, to-wit: articles of merchandise for exhibition and advertising.

It is submitted that a showman might as well fold up his canvas in a huge trunk and pass it as personal baggage, or

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send with his advance agent enough of show bills to cover an acre lot, folded up in several large trunks and call it personal baggage.

The pictures for which the plaintiff seeks to recover were not ordinary family pictures, but were pictures used as advertisements to call the attention of the public to the entertainments which were to be given by plaintiff and his family. They were like the pictures of actors, or theatre bills. They were part of the means used by plaintiff in carrying on his business, or in advertising it, and were no more personal baggage than samples of merchandise, or any other property carried for personal use but for the purpose of transacting or aiding in the transaction of business or trade.

On the question of baggage general, the counsel cited the following authorities: *Jones v. Voorhees*, 10 Ohio, 145; *Hawkins v. Hoffman*, 6 Hill, 589; *Winter v. Pacific R. R. Co.*, 41 Mo., 503; *Bell v. Drew*, 4 E. W. Smith, 59; *Merrill v. Grumel*, 30 N. Y., 594; *Butler v. Hudson River R. R. Co.*, 3 E. W. Smith, 57; *Gill v. Rowan*, 3 Penn. St. 552; *Morrow v. Great Western Ry. Co.*, 6 Albany Law Journal, 476; *Collins v. Boston & Maine R. R. Co.*, 10 Cushing, 506; *Smith v. Railroad*, 44 N. H., 325; *Stinson v. Conn. River R. R. Co.*, 98 Mass., 83; *Hopkins v. Wescott, et. al.*, 6 Blatchford C. C., 64; *Woods v. Devin*, 13 Ills., 476; *C. Cin. Air Line R. R. Co. v. Marcus*, 38 Ills., 219; *Chicago and Rock Island R. R. Co. v. Collins*, 56 Ills., 212; *Dexter v Railroad Co.*, 1 American Repts., 527.

*Brackett and Waldron*, for appellees.

SHANNON, C. J.—The chief questions presented by the record are, first, whether upon the facts as stated, and the evidence embraced in the case brought up on appeal, the railroad company is liable for the property of the plaintiff contained in the box; and second, whether there is any error in the instructions given by the Court to the jury.

All the disputed facts were determined by the jury when they found for the plaintiff on all the issues; and their decision upon such facts should stand, unless there was in-

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sufficient evidence to warrant their finding. As to the circumstances attendant upon the delivery of the box to defendant's agent, the only discrepancy between the two witnesses for the plaintiff and the two who testified for the defendant, consisted in their different versions of what was said and done after the trunks and the other box were checked. The solution of this contradictory testimony depended, of course, upon the credibility of the witness; and the jury, whose province it was, saw fit to adopt the statement of the plaintiff's witnesses.

From the whole case as presented here, it therefore appears that on the 30th of December, 1874, at Belle Plain, in Iowa, the plaintiff purchased tickets from defendant's agent for himself, his son, and two daughters for their passage over defendant's road from the station named, to Missouri Valley Junction, in the same State. At Belle Plain, upon exhibiting the tickets to defendant's baggage-master there, (who had authority to receive and check baggage), and pointing out their baggage consisting of three trunks and two small boxes, the agent checked the trunks and one of the boxes; but the box in controversy,—a rough, pine box of about 18 by 20 inches and 10 inches in depth, with plaintiff's name printed upon it,—having no handle or place to which a check could be fastened, was for that cause (and for that cause only, as all the witnesses agree), not checked; but the agent received the box, saying that "he would place it in the baggage car, and it would go just as safe, only at Missouri Valley it would be necessary to look after it, or it might pass." With this understanding and agreement the plaintiff and his family got on the train, and on their arrival at the Missouri Valley Junction this box was missing. The plaintiff immediately informed the baggage-master of defendant, at the latter place, of the fact, who said he would send back "a feeler," and promised to telegraph; he took plaintiff's address, and said he would follow it up. The plaintiff's son also telegraphed from the junction. The plaintiff after having written to the baggage-master at Chicago, and not recovering the box or its contents, brought his action.



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It further appears that, upon the trial, the railroad company, for the purpose of avoiding liability, disclosed the fact by the deposition of its agent who had received the box, that it had not been placed in the baggage car, but was left on the platform, from which, after the starting of the train, it was carried by him into the baggage room.

The other witness for defendant, the night baggage-master, after deposing that he was present when the other agent—the day baggage man—received and checked some baggage for plaintiff, and that “there was one small box that had nothing to which a check could be fastened,” further declared as follows: “The next time I saw the box was in the evening of the day that said Waldrons left for the west. When I went on duty I found the box in the baggage room of the depot.” It also appears that the defendant, to show its non-liability, set up the defense that the box was delivered, on that evening, at Belle Plain, to an alleged agent of the plaintiff, one Truesdell. To support this the further deposition of the night baggage-master was read to the jury, as follows: “About nine o’clock that evening Truesdell came there and told me he wanted to buy a ticket to State Center, and wanted that box, left in the morning, checked to State Center. I sold him a ticket to State Center, and he told me the box contained photographs, and that he wanted me to see some of them. He then unlocked the box, took out some of the pictures, and insisted on my taking one of them, which I did.” [The photographs were pictures of the plaintiff and his family.] “He then locked the box and put a small rope around the box, and I checked it to State Center, Iowa, and put it on the train.”

The plaintiff, on the other hand, denied the existence of any authority whatever in Truesdell to receive the box, and gave counter evidence upon the point; and the question of Truesdell’s agency, whether actual or ostensible, was fairly given to the jury by the charge of the Court.

Between the places named, the company was, at the time, a common carrier over its road, not merely of passengers and

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their baggage, but also of articles of freight to be transported in its baggage cars, when such articles were accompanied by a passenger. And such passenger was chargeable with additional compensation whenever demanded of him. In this case the agent of the company before accepting the box, made no suggestion or demand of that nature.

As a carrier of passengers the company was bound, unless there was reasonable ground for refusal, to take all persons who applied for passage, and their baggage, not exceeding one hundred pounds of weight to each passenger; and as a carrier of such packages of freight as above described, to take them when offered for transportation by the accompanying passenger. And it was responsible, when duly delivered and accepted, for the safe conveyance and delivery of such baggage, and of such packages, to and at the point for which they were destined, unless prevented by an act of the public enemy, by act of law, or by an irresistible superhuman cause.

A delivery to a duly authorized agent of a common carrier, who is in the habit of receiving packages, is undoubtedly a sufficient delivery. In this case the delivery to Barstow, the agent of the company, was to one intrusted to receive baggage and packages, and not to one engaged in other duties.

A rough pine box, such as is used for merchandise, was presented for transportation and exposed to the view of the proper agent; it was of small dimensions, and of a kind rarely if ever used for packing wearing apparel. If it was not properly baggage it was a package of freight to go with the passengers. The property in the box was evidently not so packed as to assume the outward appearance of ordinary baggage, or so as to deceive or conceal. It was within the scope of the agent's business and duty to decide whether the company would receive and carry the box as baggage, or as an article of freight. If the latter, it should have been so stated, and the terms made known and insisted upon, if the company was desirous of avoiding any sort of responsibility for it as baggage. This principle is, we think, fully sustained by what is stated in the opinion of the Supreme Court, in the case of the *Hannibal Railroad v. Swift*, 12 Wallace, 274,

to-wit: "But if property offered with the passenger is not represented to be baggage, and it is not so packed as to assume that appearance, and *it is received for transportation on the passenger train*, there is no reason why the carrier shall not be held equally responsible for its safe conveyance as if it were placed on the freight train, as undoubtedly he can make the same charge for its carriage."

To the same purport is the case of *Great Northern Railroad Company v. Shepherd*, Eng. Rail. Cas., 310:—"If the traveler takes with him other articles, which do not come strictly within the denomination of baggage and exposes them to view, so that no concealment is practiced, and the carrier chooses to treat them as personal baggage, and carries them accordingly, and a loss occurs, he will be responsible therefor."

The company had given to its agent authority to receive and check baggage, and had also given him power to determine what property came within that class or description of property. He had similar power with regard to freight to be placed in the baggage car. In the usual and ostensible scope of his employment he received the box without hesitation, and said he would place it in the baggage car, and it would go just as safe as if checked.

But although thus delivered and accepted it was not transported at all. Yet it was taken into the custody of the company by its proper agent, and the company's liability as a carrier commenced at the instant of the acceptance. In Angell on the Law of Carriers, section 129, it is said that "the entire weight of the responsibility rigorously imposed by law upon a common carrier falls upon him contemporaneously (*eo instanti*) with a complete delivery of the goods to be forwarded, if accepted, with or without a special agreement as to reward; for the obligation to carry safely, on delivery, carries with it a promise *to keep safely* before the goods are put *in itinere*."

And again, section 131:—"A person who is a common carrier may at the same time be a warehouseman, and after he receives the goods, and before they are put *in itinere*, they

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may be lost or injured. In such case, if the deposit in the warehouse is a mere accessory to the carriage, or in other words if the goods are deposited for the purpose of being carried, such person's responsibility, as a common carrier, begins with the receipt of the goods. That is, he then becomes responsible for all losses not occasioned by inevitable casualty; whereas, if he were a mere warehouseman, he is not liable, unless he has been guilty of ordinary neglect."

In *Camden R. v. Belknap*, 21 Wend., 354, it was considered that where the baggage was received but lost before transportation, the railroad company was answerable, as a common carrier, *for the safe keeping of the property*; and that its liability existed independent of any other contract, express or implied, for the safe keeping of the property, and without regard to any question of negligence, and that the Judge would have been well warranted in instructing the jury that the owner was entitled to their verdict. See, also, *Hickox v. Naugatuck R.*, 31 Conn., 281:—If a trunk is delivered at a railroad station at 11 A. M., to go in a train at 3 P. M., the railroad is liable as a carrier from the time of delivery.

About ten hours after the reception of the box, and the departure of the plaintiff and his family on the train, the night baggage-master, Staibler, who had been present at the delivery, undertook to surrender it to a third party, and did so. The question of fact as to Truesdell's authority to receive it as agent of plaintiff was determined in the negative by the jury, under careful and accurate instructions from the Court, and upon sufficient evidence. Where the defense is that a delivery was made to an agent of the owner, or consignee, it must be clearly proved that the person to whom the goods were delivered as agent was duly authorized as such. The carrier is under as much obligation to deliver property to the *right person*, as he is to deliver it in a reasonable time and at the proper place. Although Truesdell had before been an "advance agent" of plaintiff for the purpose of posting advertisements, etc., it by no means follows from this alone that he had any authority to receive and take away to State Center, property just consigned by the owner himself into the

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custody of the company for transportation to Missouri Valley Junction, and which the owner, to the actual knowledge of both of the defendant's agents, intended to take in the same train with him to the latter place. If Staibler had not what was almost equivalent to actual notice of the dissolution of all business relations between the plaintiff and Truesdell, yet he certainly had enough in the acts and statements of the latter, under all the circumstances, to put a person of ordinary prudence and care upon guard and inquiry. If the delivery by a carrier be to the wrong person, although it be entirely by mistake, or by gross imposition, or upon a forged order, the carrier will nevertheless be responsible for the value of the goods so lost. (Story on Bailments, § 545 b.; also § 450; Angell, Car., § 324; *Winslow, et. al. v. Vermont & Mass. R. Co.*, 1 American Reports, 365.)

In *Stephenson v. Hart*, 4 Bing., 476, the delivery was, as in this case, to a person who showed that he had a knowledge of the contents of the box. And in *Duff v. Budd*, 3 Brod. & B., 177, the delivery was to a person to whom the defendant had before delivered parcels. Burroughs, J., said:—"Carriers are constantly endeavoring to narrow their responsibility and creep out of their duties, and I am not singular in thinking that their endeavors ought not to be favored. The question here is, whether there was gross negligence. I think there was, and I am of opinion that the case was properly left to the jury, and that they have given a proper verdict."

Moreover, even if this defendant were not liable as a carrier, but simply as a warehouseman, yet this would follow: that warehousemen are not only responsible for losses which arise by their negligence, but also for losses occasioned by the innocent mistake of themselves and of their servants in making a delivery of the goods to a person not entitled to them. For it is a part of their duty to retain the goods until they are demanded by the true owner; and if, by mistake, they deliver the goods to a wrong person, they will be responsible for the loss, as upon a wrongful conversion.

To recapitulate, there was no allegation or pretence that

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the plaintiff was endeavoring to practice a fraud on the company. He made no misrepresentations, and was not asked as to the contents or value. The box contained neither merchandise nor samples of merchandise; neither money nor jewelry, nor other valuables. With full knowledge of all the circumstances, that plaintiff had in the forenoon paid for tickets for himself and family, and had exhibited three trunks and two boxes as belonging to the party; that the trunks and one box had been checked as baggage; that the one in controversy had been accepted, but not checked solely because there was no place to which to attach a check; that thereupon plaintiff was told by the baggage-master that he would place it in the baggage car, and it would be just as safe; that the owner had gone on in the train, resting upon this understanding and agreement, whilst, contrary thereto, the package was left behind; with the box, the same evening, opened and its contents made known, and with a full right still to demand and exact freightage, if it was not strictly baggage; with the agent actually receiving a photograph of one of the plaintiff's daughters, as a gift from a person known not to be the owner, but who was desirous to obtain possession of the property; with all this, the company saw fit to deliver it to a wrongful claimant, and wound up the transaction by checking it for him, as baggage, to State Center.

We can see no error in the instructions to the jury; and we therefore hold, that, upon the case as settled and the evidence made part of it, the railroad company is liable for the said property of the plaintiff.

With regard to the remaining question, that of jurisdiction, it is to be observed that the attachment, under our Codes, is not original process; and by it an action is not commenced, nor upon it alone can judgment be obtained. The action is commenced by summons, and the attachment is an adjunct. It is an order in an action for the arrest of the debtor's property, in the nature of bail, for the payment of such judgment as the plaintiff may obtain. It is a remedy that can be employed only in an action already commenced, and has no existence independent of the action in which it is obtained.

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A court can acquire a limited jurisdiction in an action by the allowance of a provisional remedy; but jurisdiction does not become *complete* until the service of a summons in some of the modes prescribed by law, or by the voluntary appearance of the defendant.

In this case the defendant voluntarily appeared by its attorney, made answer, and contested the claim throughout. A voluntary appearance by the defendant is equivalent to personal service of the summons upon him, and after such appearance the court acquires full jurisdiction for all purposes whatsoever.

The proceedings upon attachment may be void, or so defective as to give no jurisdiction of the person of the defendant; yet if he appears and contests the action upon the merits, a valid judgment may be rendered.

The judgment of the District Court is

**AFFIRMED.**

All the Justices concur.

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JUNE TERM, 1877.

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PRESENT:

HON. PETER C. SHANNON, CHIEF JUSTICE.

HON. ALANSON H. BARNES,

HON. GRANVILLE G. BENNETT,

} ASSOCIATE JUSTICES.

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THE TERRITORY V. CONRAD.

1. **INDICTMENT: DEGREES OF CRIME: CONVICTION.** On an indictment charging an assault, or assault and battery with intent to kill, the defendant may be convicted either of the crime charged, or of an assault, or assault and battery with intent to do bodily harm, or for assault and battery, or for a simple assault.
2. **\_\_\_\_\_:** \_\_\_\_\_. An assault with intent to do bodily harm and without justifiable or excusable cause, is not a felony under the statute, nor was it at common law.

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3. ———: VERDICT: JUDGMENT. A verdict on an indictment for "an assault upon and for shooting one F. McM. with a pistol, commonly known as a revolver, loaded with gun powder and leaden bullets, with intent to kill," finding "the defendant guilty of assault with intent to do bodily harm, and without justifiable or excusable cause," is a conviction for a misdemeanor, and will not sustain a judgment as for a felony.
4. SENTENCE: ILLEGALITY: CORRECTION. Where the only error complained of is the illegality of the sentence, the Supreme Court has the power to affirm the conviction, modify the judgment, and remit the case to the court below that the proper judgment may there be imposed.

*Writ of Error to the Yankton County District Court.*

THE defendant was indicted and tried in the court below for "an assault upon and for shooting one F. McM. with a pistol, commonly known as a revolver, loaded with gun powder and leaden bullets, with intent to kill." The statute under which this indictment was found, reads as follows: "Every person who shoots or attempts to shoot at another, with any kind of firearms, or other means whatever, with intent to kill any person; or who commits any assault and battery upon another by means of any deadly weapon, and by such other means or force as was likely to produce death, with intent to kill any other person, is punishable by imprisonment in the Territorial prison not exceeding ten years." (Penal Code, § 279.) The statute relating to assaults with intent to do bodily harm, is as follows: "Every person who with intent to do bodily harm and without justifiable or excusable cause, commits any assault upon the person of another, with any sharp or dangerous weapon; or who without such cause, shoots or attempts to shoot at another with any kind of firearms, or air gun, or other means whatever, with intent to injure any person, although without intent to kill such person or to commit any felony, is punishable by imprisonment in the Territorial prison, not exceeding five years, or by imprisonment in a county jail not exceeding one year." (Penal Code, § 309.)

"A felony is a crime which is, or may be punishable with death or by imprisonment in the Territorial prison. Every other crime is a misdemeanor." (Penal Code, §§ 5 and 6.)



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Upon the trial the jury rendered the following verdict, to-wit: "We, the jury, find the defendant guilty of an assault with intent to do bodily harm, and without justifiable or excusable cause." There was no motion for a new trial, or in arrest of judgment; and no steps were taken to bring the evidence, or any part of it, within the record. The Court sentenced the defendant to five years' imprisonment in the Territorial prison, to which judgment the defendant excepted and removed the cause to this court by writ of error, presenting the sole question as to the legality of the judgment.

*S. L. Spink*, for defendant.

Under the statutes of Dakota there is no such crime as assault with intent to do bodily harm, unless the assault is committed with some sharp or dangerous weapon, or some shooting instrument. (Sec. 309, Penal Code.) The weapon used is a necessary ingredient of the crime, and the failure of the jury to find that the assault was committed by one of the weapons named in the above section reduced the verdict to a verdict for simple assault, for which the punishment is fine or imprisonment in the county jail, or both. (*O'Leary v. The People*, 17 Howard's Practice Rep., 316; 4 Parker's Cr. Rep., 187; 5 Parker's Cr. Rep., 214; 24 Howard's P. R., 400; 47 Barber, 504; 4 Parker's Cr. Rep., 61; 6 California, 562; 9 California, 260; 40 California, 427; 44 California, 580; 45 California, 281; 47 California, 112; 50 Miss., 492.) Statute of N. Y.: assault with intent to commit bodily injury; see Wharton's American Cr. Law, 2d Vol., § 1274.

*P. K. Faulk*, District Attorney, for the Territory.

Sections 280 and 309, Penal Code.

INDICTMENT.—The greater offense, that is the assault with intent to kill, includes the lesser, the assault with intent to do bodily injury—assault, *main charge*. (Opinion of Supreme Court of Dakota in *Odell* case; Secs. 291, 292, Penal Code.)

As to form of verdict, *vide* sections 394, 395, and 400, 401, 402, of Code of Criminal Procedure. (26 Illinois, 500; 30 California, 215; 26 Texas, 114; Green. Crim. Reports, 194.)

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SHANNON, C. J.—The defendant was indicted and tried in the District Court of Yankton county, for an assault upon and for shooting one Frank McMahon with a pistol, commonly known as a revolver, loaded with gun powder and leaden bullets, with intent to kill.

There was a preliminary motion, on part of the defendant, for a continuance. To the ruling of the Court denying said motion, the defendant took an exception, which was abandoned, and is not contained in the assignment of error.

The jury rendered the following verdict: "We, the jury, find the defendant guilty of assault with intent to do bodily harm, and without justifiable or excusable cause."

There was no motion for a new trial, or in arrest of judgment, and no step was taken to bring the evidence, or any part of it, within the record.

The Court, on May the first, 1877, sentenced the defendant to five years' imprisonment in the Territorial prison, to which judgment the defendant immediately excepted. And thereupon a writ of error was allowed and a certificate of probable cause therefor given by the Judge below, in pursuance of sections 473 and 479 of the Code of Criminal Procedure. The certificate was filed and the execution of the judgment was stayed, and the defendant is detained to abide the judgment of the Supreme Court, according to section 480 of the same Code.

The sole exception before us, is to the judgment itself. The only assignment of error is, that the District Court erred in pronouncing judgment as for a felony and sentencing the defendant to confinement for five years in the penitentiary, upon the verdict of the jury, the verdict amounting only, as alleged, to finding the defendant guilty of a simple assault, which is a misdemeanor only.

Our Penal Statutes on the subject, in force at the time of the commission of the offense, were the same as those now existing. Section 279 of the Penal Code (Revised Codes; page 769), prescribes that "every person who shoots or attempts "to shoot at another with any kind of firearms, air gun, or "other means whatever, with intent to kill any person, or

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“who commits any assault and battery upon another by means of any deadly weapon, and by such other means or force as was likely to produce death, with intent to kill any other person, is punishable by imprisonment in the Territorial prison not exceeding ten years.”

This section is divisible, contains two clauses and embraces two species of offense punishable alike. The first relates alone to shooting or attempting to shoot at another with any kind of firearms, air gun, or other means whatever, with intent to kill any person. The indictment now before us was framed upon this first branch of the section, and charges an assault and a shooting, “with a certain kind of firearms, to-wit: a pistol, commonly known as a revolver, then and there loaded with gun powder and leaden bullets,” with intent to kill him, the said Frank McMahon, charging the intent in proper words.

The second branch of this section has reference to the commission of *any assault and battery* upon another by means of *any* deadly weapon, and by such *other* means or force as was likely to produce death, with intent to kill any other person.

But the jury did not find the defendant guilty of the offense with the commission of which he stood charged. They inferentially acquitted him of that when they found him guilty of an assault “with intent to do bodily harm.”

The jury may find the defendant guilty of any offense, the commission of which is necessarily included in that with which he is charged in the indictment, or of an attempt to commit the offense. (See Code of Crim. Pro., § 402.)

This court accordingly held, at the January term, 1876, in the case of *The People v. Orris F. Odell*, [Mr. Justice BENNETT delivering the opinion], on an indictment for shooting, with a shot-gun, with intent to kill, that a defendant “may be convicted either of the crime charged, or of an assault or assault and battery with intent to do bodily harm, or for assault and battery, or for a simple assault.” In that case, however, the verdict was “guilty as charged in the indictment.” No question did or could arise in it as to the proper form of a verdict,

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upon such an indictment, when the jury should conclude to convict only of the second grade, to-wit: under section 309 of the Penal Code.

It has been argued by the counsel for the Territory that the jury plainly intended to convict under this section, that the conviction is good under it, and that the judgment is valid. Let us examine this important question in the light of the statute itself. By section 309 of the Penal Code it is declared that "every person who, with intent to do bodily harm, and "without justifiable or excusable cause, commits any assault "upon the person of another with any sharp or dangerous "weapon—or who, without such cause, shoots or attempts to "shoot at another with any kind of firearms, or air gun, or "other means whatever, with intent to injure any person, al- "though without intent to kill such person or to commit any "felony, is punishable by imprisonment in the Territorial "prison not exceeding five years, or by imprisonment in a "county jail not exceeding one year."

This section is likewise divisible: First, every person who, with intent to do bodily harm (although without intent to kill, etc.), and without justifiable or excusable cause, commits any assault upon the person of another with any sharp or dangerous weapon is punishable, etc. Secondly, every person who, without such cause, shoots or attempts to shoot at another with any kind of firearms, or air gun, or other means whatever, with intent to injure any person, although without intent to kill such person or to commit any felony, is punishable, etc. This second clause, except as to the intent and punishment, is almost the counterpart of the first branch of section 279, and both have special reference to shooting or attempting to shoot. The other clauses in the two sections have relation not to shooting and firearms, but to other instrumentalities, viz.: in the one case to deadly weapons or force, in the other to sharp or dangerous weapons.

In each of these divisions, as applicable to a given case, a compound offense is carefully marked out and defined, the initial ingredient being an assault. Certain elements, or particulars, are specified, which, when united, form the comple-

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ment of the offense. It is not the criminality of the intent alone, nor is it the nature or kind of the weapon, or means employed, merely; for each is a component and an essential part of the whole offense as described, and each lends its own peculiar aggravation to the crime.

In an indictment under either branch of this section, it would clearly be requisite to charge all the particular circumstances *necessary* to constitute the complete offense. The accurate pleader can readily perceive that as to one element the kind or nature of the instrument is essential to be alleged. And as an indictment must be direct and certain as it regards the particular circumstances of the offense charged, when they are *necessary* to constitute a complete offense, so must a verdict be direct and certain in a case like this, and must embrace all the necessary elements, if the jury intended to convict under this section. Perhaps the jury so intended; but how are we to say this, except by giving a loose rein to conjecture or inference? It is their peculiar province to determine facts, intents, and purposes; and it is their duty to pronounce their conclusions in accordance with their own judgments. As juries do not give reasons for their verdicts, it can never be legally known what were the precise grounds for them; and if they are in any degree favorable to the accused, it is always presumable they were so given because the evidence was not sufficient in degree, or satisfactory in character.

It would be supremely dangerous to extend the express language of a verdict so as, by implication, to supply a supposed omission, which would make that a felony, which is explicitly declared a misdemeanor. In a case like this every principle of propriety and safety tends to holding to the rule of a strict construction.

This verdict does not find the defendant guilty of the assault as charged, or in manner and form as alleged in the indictment. It does not express the kind or nature of any weapon used. Take it as it is and what does it amount to? An assault with intent to do bodily harm, and without justifiable or excusable cause, is not a felony by our statute, nor was it at common law. With all its verbiage it is nothing

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but a simple assault, and the defendant below cannot be punished for a felony.

In *Hursy v. The People*, 47 Barbour, 503, the verdict was "guilty of an assault with intent to do bodily harm." It was held that this was in legal effect but a finding of guilty of simple assault, and that the sentence, being for a felony, was unauthorized.

In *O'Leary v. The People*, 17 How. Pr. R., 316, (also in 4 Parker, 187,) which was an indictment for assault and battery with a deadly weapon with intent to kill, the verdict was "guilty of assault and battery with intent to kill." The jury, however, did not find the defendant guilty of that which, under the New York statute, constituted a main feature of the offense, to-wit: the commission of the act "by means of any deadly weapon." The prisoner had been sentenced as for a felony to the State's prison, but the judgment was reversed.

The 50th section of the statute of California, concerning crimes and punishments, (quoted in *The People v. Murat*, 45 Cal., 282,) was as follows: "An assault with an intent to "commit murder, rape," etc., "shall subject the offender to "imprisonment in the State prison for a term not less than "one year nor more than fourteen years. An assault with a "deadly weapon, instrument, or other thing, with an intent "to inflict upon the person of another a bodily injury, where "no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant "heart, shall subject the offender to imprisonment in the "State prison, not exceeding two years, or to a fine not exceeding five thousand dollars, or both such fine and imprisonment."

Under the new Penal Code of that State, adopted in February, 1872, the old statutes on the subject are substantially retained. (See §§ 217, 220, 221, 245.)

The following decisions of the Supreme Court of California, although based upon the foregoing enactments, (which are different from ours) yet sustain the principle we have established in the present case: *The People v. Davidson*, 5 Cal., 134;

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*The People v. Nugent*, 4 Cal., 341; *People v. Vanard*, 6 Cal., 562; *People v. Wilson*, 9 Cal., 260; *People v. English*, 30 Cal., 215; *Exparte Ah Cha*, 40 Cal., 426; 44 Cal., 32; *People v. Congleton*, 44 Cal., 92; *Exparte Max*, 44 Cal., 579; *People v. Mural*, 45 Cal., 281; *People v. Martin*, 47 Cal., 112.

The defendant was legally and regularly convicted of a misdemeanor. Everything is right but the sentence, which is in excess and illegal; this court, therefore, has the power to affirm the conviction, modify the judgment, and remit the case to the court below that the proper judgment may be there imposed. For this court is not confined to the mere alternative of reversing or of affirming a judgment. It has also the authority to modify a judgment, and as in civil cases, to direct the proper judgment to be entered. That is to say, it may reduce, or lower, in extent or degree, any sentence so as to make it conformable to law, where a mistake or error is shown to exist in it. It may change the form of the judgment, or give a new form to it, so as to bring it within the jurisdictional scope of a legal conviction.

It is therefore adjudged that the said judgment of the District Court of the county of Yankton, rendered on the first day of May, 1877, sentencing the said Charles M. Conrad to imprisonment in the Territorial prison for five years, be and the same is hereby modified and reduced in this, to-wit: that instead of the said imprisonment in the Territorial prison, the said Charles M. Conrad shall either undergo an imprisonment in the county jail not exceeding one year, or he shall pay a fine not exceeding one thousand dollars, or be sentenced to both such fine and imprisonment. And in order to carry this modified judgment into effect, it is directed that the said District Court cause the said Charles M. Conrad to be brought before it, to receive judgment accordingly.

All the Justices concur.

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NOTE.—The following cases have been examined and considered in reference, generally, to the present case: *Dawson v. The People* 25 N. Y., 399; *Keefe v. The People*, 40 N. Y., 348; *Dedieu v. The People*, 22 N. Y., 184; *Ratzky v. The People*, 29 N. Y., 133; *Harris v. People*, 59 N. Y., 599; *Slattery v. People*, 1 Hun, 311, affirmed by Ct. of App. in 58 N. Y., 354.

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BONESTEEL V. GARDNER, ET AL.

1. **PERSONAL PROPERTY: ACTION TO RECOVER: PROVISIONAL REMEDY.**

The action for the recovery of personal property, under the provisions of the Code of Civil Procedure, is an original action, and may or may not have coupled with it the provisional remedy of claim and delivery.

2. **GENERAL APPEARANCE: ENTRY BY DEFENDANT: EFFECT OF.** A voluntary appearance by the defendant to the suit generally, is equivalent to personal service of the summons upon him; and after such appearance the court acquires full jurisdiction for all purposes whatsoever.

3. ———: ———: ———. If the proceedings under the writ for obtaining possession of the property were so irregular and defective that no jurisdiction could thereby be conferred, all questions in relation thereto become immaterial after defendant appears, answers and contests the case on its merits.

4. **JUDGMENT. JUSTICES COURT: APPEAL.** An appeal to the District Court, from the judgment of a justice of the peace, under the provision of a statute, requiring the trial to "proceed in all respects, in the same manner as though the action had been originally instituted therein," excludes the consideration of any alleged errors committed by the justice, on the trial, except such as relate solely to jurisdictional questions.

5. ———: ———; ———. The object of an appeal from the judgment of a justice, prior to the passage of the Revised Codes, was to try the case on its merits, and such an appeal was not designed to perform the functions of a *certiorari*.

6. **EVIDENCE: WRITTEN: EXCEPTIONS.** To the general rule that when written evidence of a fact exists, all parol evidence is excluded, there are exceptions, such as that written acknowledgments and receipts need not be produced or their absence accounted for to admit parol evidence of the transaction which they are designed to evince.

7. ———: ———: ———. A bill of parcels, receipted, of the sale of articles of personal property, need not be produced to prove a sale; parol evidence is competent on the ground that such paper generally amounts to nothing more than a receipt for the price.

8. ———: ———: **WHEN INDISPENSIBLE.** Whenever it turns out that a writing exists with regard to a transaction, which the law regards as the best evidence, it must be produced or its absence accounted for. A bill of sale being the best evidence of title, is properly admissible in evidence.

*Appeal from Bon Homme County District Court.*

THIS is an action originally instituted in a Justice's court to recover possession of certain personal property, and taken to



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the District Court and tried on appeal. Judgment in the Justice's and District Courts were for the plaintiff.

The facts necessary to a full understanding of the case, and the errors complained of, sufficiently appear from the opinion.

*Oliver Shannon*, for appellants.

*G. C. Moody and Gamble Bros.*, for appellee.

BENNETT, J.—The record on which this cause is presented to this court is very unsatisfactory, and has the appearance of having been prepared in utter disregard of the rules of this court, and the provisions of the statute regulating appeals.

There is no assignment of errors, except such as may be found in appellant's submitted brief. Points are urged in the argument that are not presented by the record, and this court asked to pass upon them. Exceptions are taken to instructions given by the court to the jury, and to the refusal of the court to instruct as requested by defendants, while it no where appears from the record that all the instructions given are before this court, neither is there any evidence certified up, showing error in the instructions given, or the relevancy of those refused, and no case with exceptions settled, and nothing disclosing any effort or diligence on the part of defendants to obtain the same.

Certainly there can be no excuse for such irregularities and departures from well established rules of practice.

These criticisms may, with great propriety be applied to the record in other cases brought to this court, and it is to be hoped that in the future the members of this bar will, in this respect, so honor their profession as to merit the praise, rather than the censure, of this court.

This action was commenced in a justice's court, for the possession of personal property. Under the provisions of the justices' code, then in force, sections 148 and 149, seizure of the property in dispute, under the writ, was not necessarily essential to confer jurisdiction. If the defendant cannot be served, and enters no appearance, then the action is in the nature of a proceeding *in rem*, and possession of the property

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under the writ necessary to authorize the justice to proceed to judgment. This action, under the provisions of our Code of Civil Procedure, is an original action, and may or may not have coupled with it the provisional remedy of claim and delivery. This is plain from the language of section 159 (176, new Code): "The plaintiff, in an action to recover the possession of personal property, may, *at the time of issuing the summons, or at any time before answer*, claim the immediate delivery of such property," etc. And this is now the provision of the Justices' Code. (§ 32, new Code.) Under the old Justices' Code, the claim for immediate delivery was an absolute ingredient of the proceedings, and was required to be made at the commencement of the suit. Under either statute the issue to be tried and determined, is the right of possession, the questions of damages, etc., being incidental and concomitant.

The purpose of the law in providing for the seizure of the property prior to the determination of the rights of the parties is two-fold: 1st, to give to the party showing himself, *prima facie*, entitled thereto, the possession, *lis pendens*, and 2d, to prevent it from being spirited away, or otherwise disposed of, and to secure its forthcoming to answer any judgment that may be rendered in the case. But these collateral questions do not affect the main issue—the right of possession—as before stated.

Now, admit that the property in dispute was not in Bon Homme county at the time of the commencement of the suit, and that it was necessary that it should have been there in order to have given the justice jurisdiction, what position did appellants place themselves in under the pleadings, to take advantage of this question? After the seizure of the property on a counterpart of the writ, and service of the summons in Yankton county, they entered a general appearance in the Justice's court, and without interposing any objection to, or in any manner raising the question of jurisdiction, answered, their answer being in the form of a general denial.

There is no question but that the subject matter of litigation, generally speaking, was within the jurisdiction of the

justice, it involved the right of possession of personal property of the value of less than one hundred dollars.

In the case of *George P. Waldron v. The C. & N. W. Railway Company*, (Dec. term, 1876,) Mr. Chief Justice SHANNON in delivering the opinion of this court, uses the following language: "A court can acquire a limited jurisdiction in an action by the allowance of a provisional remedy; but jurisdiction does not become complete until the service of a summons in some of the modes prescribed by law, or by the voluntary appearance of the defendant. In this case the defendant voluntarily appeared, by its attorney, and made answer, and contested the claim throughout. A voluntary appearance by the defendant is equivalent to personal service of the summons upon him, and after such appearance the court acquires full jurisdiction for all purposes whatsoever. The proceedings upon the attachment may be void, or so defective as to give no jurisdiction of the person of the defendant; yet if he appears and contests the action upon the merits, a valid judgment may be rendered."

These principles are applicable, and the case from which I have quoted, analagous to, the one at bar. Even if the proceedings under the writ for obtaining possession of the property were so irregular and defective that no jurisdiction was conferred thereby, all questions in relation thereto become immaterial after defendants have appeared, answered and contested the case on its merits.

From the judgment of the justice, defendants appeal, and the parties find themselves in the District Court, with issue joined on complaint and answer, and required to "proceed in all respects, in the same manner, as though the action had been originally instituted therein." And this is generally construed to exclude the consideration of any alleged errors committed by the justice on the trial, except such as relate solely to jurisdictional questions. This leads us to notice the first error complained of. It is urged that the District Court erred in overruling defendants' motion for change of place of trial. The ground on which this motion is based, is that both defendants reside in the county of Yankton, and resided there

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at the commencement of the action, and were not residents of Bon Homme county.

There are two reasons why the ruling of the court on this motion was correct. First: Section 76, Code of Civil Procedure (Sec. 92, new Code), provides that "actions for the following causes must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, in cases provided by statute. \* \* \*

"4. For the recovery of personal property distrained for any cause."

Section 150 of the Justices' Code (then in force), reads as follows: "When any of the property is removed to another county after the commencement of the action, counterparts of the writ of replevin may issue on the demand of the plaintiff to such other county," etc. The record discloses the fact that a counterpart of the writ was issued by the justice, and he must have been satisfied before issuing such counterpart, either from the return of the officer or other evidence, that the property was removed from the county after the commencement of the suit. To this ruling and adjudication of the justice defendants took no exception, and in no manner attempted to put the question in issue, and it became wholly immaterial after defendants had appeared generally, answered and contested the case on its merits. But that question aside, under the findings of the justice, nowhere disputed by the pleadings, that the property was removed after the suit was commenced, it was properly brought in Bon Homme county, and the motion was therefore properly denied.

But in the second place: Section 79, Code of Civil Procedure (Sec. 95, new Code), provides that "if the county designated for that purpose in the complaint, be not the proper county, the action may, notwithstanding, be tried therein, unless the defendant, *before the time for answering expire*, demand in writing that the trial be had in the proper county," etc. In this case the time for answering had not only expired but the parties had actually answered, and the cause had once been tried on its merits, and every other considera-

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tion aside, under this provision of the Code, the motion came clearly too late. This statute recognizes the general principle above laid down, that a general appearance and answer, is a waiver of all objection, and submission to, the jurisdiction of the court. I am speaking of jurisdiction of the person, and do not want to be understood as even intimating that where the court has no jurisdiction of the subject-matter of the action, it may be conferred by consent, either actual or implied.

The next error alleged, is the refusal of the court below to reverse the judgment and proceedings of the justice. I have already incidentally touched on this point. It seems to me that counsel for appellants is very far astray in assuming that any such power is given the District Court on appeal. The object of an appeal from the judgment of a justice, under the statute as it then stood, was to try the case on its merits, and such an appeal was not designed to perform the functions of a *certiorari*. (*Mahr v. Young*, 13 Wis., 634.)

The very language of the statute, that "the parties shall proceed *in all respects* in the same manner as though the action had been originally instituted in the said (District) court," excludes the possibility of reasonable doubt, that its purpose was to obtain a full and fair trial on the merits without regard to errors in the proceedings before the justice. (*Barnum v. Fitzpatrick*, 11 Wis., 81.)

The pleadings and proceedings in a Justice's court are not to be subjected to the strictest rules of legal criticism, and are always treated with great leniency by appellate courts; and the Legislature anticipating that errors would be committed, and irregularities found in the trial of most cases in these courts, wisely preferred giving the parties, as their only remedy, the advantage of a new trial on the merits in the District Court, rather than provide for a reversal of the cases, on errors of law, and have them sent back to be tried, found again in the appellate court, perchance again reversed and travel the same road, at great expense, and vexatious delay. Had the Legislature intended otherwise it would have provided for appeals from errors of law, or for having such alleged errors reviewed on *certiorari*. Neither of these

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remedies had then been provided, and we must conclude that all errors of the justice committed on the trial (not of a jurisdictional character) are out of the case, under the then existing statutes, when it is brought on appeal to the District Court, and as that court could not consider them there is no method by which they can be presented here for review.

Equally intenable is the position of counsel for appellants that there was error in the admission on the trial of a certain bill of sale, evidencing the transfer of the property in dispute from a third party to the plaintiff. It is a general rule that when written evidence of a fact exists, all parol evidence is excluded. There are, however, exceptions to this rule, such as that written acknowledgments and receipts need not be produced, or their absence accounted for, to admit parol evidence of the transaction which they are designed to evince. (*Tobey v. Barber*, 5 John., 72; *Southwick v. Hayden*, 7 Cowen, 334.)

So a bill of parcels, receipted, of the sale of articles of personal property need not be produced to prove a sale; parol evidence is competent on the ground that such paper generally amounts to nothing more than a receipt for the price. (*Blood v. Harrington*, 8 Pick., 552.)

In this case the question of title in the plaintiff was directly in issue, for on the title hinged the right of possession. Plaintiff claimed to have acquired title by contract with one Jonas Petrie, which was shown to be in writing, in the form of a bill of sale, executed by Petrie to plaintiff. This was more than an ordinary bill of parcels amounting merely to a receipt for the price; in terms, it purported to sell, assign and convey the property to plaintiff, with a warranty of title.

It is well settled that whenever it turns out that a writing exists with regard to a transaction, which the law regards as the best evidence, it must be produced or its absence accounted for. The bill of sale being the best evidence of plaintiff's title, it was properly admitted in evidence. (*Dunn v. Hewett*, 2 Denio, 637.)

The remaining points in appellant's brief relate to alleged errors in instructions given and refused by the court below.

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These instructions are meaningless to us in the absence of the evidence, with reference to which they were given, or asked, and as such evidence is not before us, they cannot be considered.

All the Justices concurring, the judgment of the District Court is

**AFFIRMED.**

1	379
2	161
5	253
46*	583
4*	698
38*	443

**THE TERRITORY V. CHARTRAND.**

1. **HOUSE OF ILL-FAME: REPUTATION: EVIDENCE OF.** Under an indictment charging defendant with keeping a bawdy house or house of ill-fame, evidence tending to show the general reputation or character of the house kept by defendant is admissible.
2. ———: ———: ———. The prosecution must first show that the defendant kept the house in question, and may then show its general character or reputation, and that of its frequenters and of the defendant; and if this satisfies the jury that the house was of the kind described in the statute, and indictment, they may so find, without proof of particular acts of prostitution or lewdness.
3. ———: **INDICTMENT: HOW SUSTAINED.** The charge may be sustained if the evidence satisfies the jury beyond all reasonable doubt that the defendant kept the house and then that it was resorted to by people of both sexes, who were reputed to be of bad and lascivious character, and that it was generally understood and reputed to be such house of ill-fame.
4. **INSTRUCTIONS: HOW CONSIDERED.** An appellate court in determining the question of error in giving or refusing instructions, examine and pass upon the instructions as a whole and not in fragmentary parts, and from such examination determine whether the jury may have been misled, or the defendant prejudiced.

*Writ of Error to the Yankton County District Court.*

THE defendant was indicted for keeping a house of ill-fame. On the trial the prosecution having shown by a witness that girls were seen in defendant's house, who were reputed to be prostitutes, and also that the defendant was there acting as keeper, tending bar, etc., then offered to prove what the general reputation of the house was, to which offer counsel for defendant objected on the ground that the evidence sought

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was incompetent, which objection was overruled by the court, and defendant took his exception. The Court gave to the jury the following instructions:

1. "Our statute declares that 'every person who keeps any bawdy house, house of ill-fame, of assignation, or of prostitution, or any other house or place for persons to visit for unlawful sexual intercourse, or for any other lewd, obscene or indecent purpose, is guilty of a misdemeanor.'

2. "The prosecution, to make out its case, must, in the first place, show that the accused party is the keeper of the house alleged to be such house of ill-fame as charged in the indictment.

3. "The question first is, did or did not the defendant keep the house? Or did some other person keep it?

4. "The prosecution is not required to show, by the evidence, any particular acts of lewdness, or prostitution in the house. This is a plain proposition.

5. "The charge may be sustained if the evidence satisfies the jury beyond all reasonable doubt, that the defendant kept the house, and then that it was resorted to by people of both sexes *who were reputed* to be of lewd and lascivious character, and that it was generally reputed to be such house of ill-fame.

6. "If such be shown, as above stated, you may find therefrom that it was such house of ill-fame.

7. "Was it, or was it not, *generally reputed* to have been such house of ill-fame? What was the general reputation of the females in the house? This is one pertinent question among the others.

8. "Again, what was the general reputation of the house? What did the public generally say about it, if anything?

9. "A house of ill-fame is a house of bad reputation. I suppose you all well know the meaning of the words, 'good reputation,' or the other words, 'bad reputation.'

10. "I repeat, the law does not oblige the prosecution to show particular acts of prostitution, or of lewdness, in the house. If it were thus essential for the prosecution to show such acts, how in the majority of cases could such evidence be obtained."



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The jury returned a verdict of "guilty of keeping a house of ill-fame, as charged in the indictment," whereupon the defendant entered a motion for a new trial, setting forth the following grounds:

"1. Because the verdict of the jury herein is not supported by the evidence.

"2. Because the Court erred in charging the jury as follows:" [Here were set out the instructions of the Court, numbered 5 to 9, inclusive.]

This motion was overruled, and defendant sentenced to imprisonment in the county jail for the period of nine months, and to pay a fine of two hundred dollars, and the cause was removed to this court for review on writ of error.

*S. L. Spink*, for defendant.

Evidence ought not to have been admitted over the objection of the defendant to show the general reputation of the house kept by said defendant. (Bishop on Crim. Pro., Vol. 2, § 114; 4 Cranch, C. C., 342, 338, and 372; Brightly's Fed'l. Dig., page 231, par. 849; 14 U. S. Dig., page 275, par. 251; 17 Miss., 247.)

But if evidence of the reputation of the house was legal and proper, still the Court erred in charging the jury that "the charge may be sustained if the evidence satisfies the jury beyond all reasonable doubt that the defendant kept the house, and then, that it was resorted to by people of both sexes, who were reported to be of lewd and lascivious character, and that it was generally reputed to be such house of ill-fame. If such be shown as above stated, you may find therefrom that it was such house of ill fame."

The questions for the jury to determine, were: 1st, was the defendant the keeper of the house in question; 2d, was the house so kept by the defendant a house of ill-fame, resorted to for purposes of prostitution and lewdness; and it was upon these points that the jury should have been satisfied beyond a reasonable doubt, before returning a verdict of conviction, and not as to the reputation of either the house or its inmates.

The charge was well calculated to mislead the jury into the belief that after they had found that the defendant was the

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keeper of the house, then their only other inquiry should be as to the reputation of the people who resorted to it, and the reputation of the house itself, and if they found them bad, they should convict, especially as the Court, nowhere in his charge, told the jury that they must be satisfied beyond a reasonable doubt that the house was actually a house of ill-fame or bawdy-house, but all the time directed their attention to the question of reputation. (*State v. Burnell*, 29 Wis., 435; *State v. Hand*, 7 Iowa, 411.)

The indictment having alleged that the house in question was resorted to for purposes of prostitution and lewdness, it was incumbent upon the prosecution to prove this fact before the jury were justified in convicting. (Brightly's Fed. Dig., page 212, par. 320; 3 Day, 283.)

The Court erred in charging the jury that "a house of ill-fame is a house of bad reputation."

The defendant in this case was charged with being the keeper of a house of ill-fame, and if the definition of the words given by the Court is correct, then if the jury found the defendant to be the keeper, and that the reputation of the house was bad, they were bound to convict. But such is not the correct definition of the words, as used in the statute. A house of "ill-fame" means a bawdy-house, not a house that has the reputation of being a bawdy-house.

The definition of the words, "house of ill-fame", taken in connection with the balance of the charge, necessarily led the jury to the conclusion that if they found that the defendant was the keeper, and that the reputation of the house was bad, they were bound to convict, which was manifest error. (*State v. Burnell*, 29 Wis., 435; *State v. Hand*, 7 Iowa, 411; 2 Archibald Cr. Law, 1007.)

*Phil. K. Faulk*, District Attorney, for the Territory.

Cited and relied on the following authorities: 29 Wis., 435; 7 Iowa, 411; 1 Bishop's Crim. Law, § 1088; 2 Parker's Crim. R., 37.

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BARNES, J.—This case is before the court for review, a writ of error having been sued out by defendant, who stands convicted in the Second District court for Yankton County of keeping a bawdy house, or house of ill-fame, to remove the case to this court.

The indictment charges the defendant with keeping a house of ill-fame, resorted to and visited by divers persons of both sexes, for purposes of unlawful sexual intercourse, lewdness, etc. (See § 371, page 781, Revised Code.)

The first error assigned is this: that the Court erred in admitting evidence to show the general reputation or character of the house kept by defendant.

In disposing of this question, it is understood as the fact appears, that the defendant was the proprietor or keeper of the house in question. That fact being established, both upon principle and authority, we think the testimony competent. Acts of adultery, acts of lewdness, acts of prostitution, are not acts to which the perpetrators give publicity or notoriety. Shameless and degraded indeed must this class of criminals be, who will not by all the means within their power conceal and hide their shame. Nor is it a crime which ordinarily will be attended with such circumstances as is calculated to lead to exposure and detection.

No immediate death or fatal shot will invite public attention to the criminals. From the necessity of the case, therefore, we are unanimously of the opinion that this testimony was properly received.

In *State v. Burrell*, 29 Wis., 435, the Court say: Prosecution must first show that the defendant kept the house in question, and may then show its general character or reputation, and that of its frequenters and of the defendant; and if this satisfies the jury that the house was of the kind described in the statute and indictment they may so find without proof of particular acts of prostitution or lewdness. The court below appears to have been governed (and we think properly) by this decision.

The second point will be more clearly understood by here inserting the following instructions: "The charge may be

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sustained if the evidence satisfies the jury beyond all reasonable doubt, that the defendant kept the house, and then that it was resorted to by people of both sexes, who were reputed to be of bad and lascivious character, and that it was generally understood and reputed to be such house of ill-fame."

The point here made by defendant's counsel is this:—"that the second issue upon which the jury was to pass was this: was the house so kept by the defendant a house of ill-fame, resorted to for purposes of prostitution and lewdness?"

This point, as I understand it, (although not very plainly stated), is this:—that the mere fact that the defendant was the keeper of a house of ill-fame, of bad repute, of bad character, is not *per se*, or of itself a crime—a misdemeanor. But that in addition to the fact that the house is of ill-fame, it must further appear that such house of ill-fame was kept as a place for persons to visit for unlawful sexual intercourse or prostitution. The fact that the defendant's house was a house of ill-fame must be charged in the indictment (as it in fact is), and that the proof must sustain that charge beyond a reasonable doubt. That the fact that defendant's house of ill-fame was so kept for persons to visit for unlawful sexual intercourse or prostitution, was a necessary averment in the indictment, and must be established by evidence beyond a reasonable doubt. And defendant's counsel insists that these issues, the two last, were not with appropriate instructions by the Court, submitted to the jury, but that the instructions upon these issues were erroneous.

It is proper to observe here that we are not examining the record in this case for the purpose of ascertaining whether other more full and perfect instructions might not have been submitted to the jury, had the defendant's counsel at the proper time asked for such other or more definite instructions; we will only examine such questions as are presented by the bill of exceptions, and have been passed upon in the court below.

It is conceded that the instruction was proper so far as it submits to the jury the proof necessary to show proprietor-

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ship of the house. But the words claimed as erroneous are the following: "And then that it was resorted to by people of both sexes, who were reputed to be of bad and lascivious character, and that it was generally reputed to be such house of ill-fame." Now observe what follows:

"If such be shown as above stated, you may find therefrom that it was such house of ill-fame." In other words and fairly interpreted, the Court say: Applying the rule as to reasonable doubt as above given, then if you find that the defendant's house was resorted to by persons of both sexes, who were reputed to be of bad and lascivious character, and that it was generally reputed to be such house of ill-fame; then from such evidence, being governed by the rules given by the Court, you may so find—that is to say, you may from that evidence find the house to be a house of ill-fame, for persons of both sexes to visit for unlawful sexual intercourse and prostitution, a house of ill-fame of the character charged in the indictment.

I am unable to discover any error in the instructions given on these points. It is distinctly saying to the jury, that the prosecution may prove the character of the house by proof of the general reputation of the persons visiting it, keeping it, and of the house itself.

Had defendant's counsel wished more definite or specific instructions upon the question of reasonable doubt, as applied to particular issues, he should have so requested at the proper time. Then if refused and excepted to, such refusal would have been before this court for review.

The only remaining question presented for our consideration, and forcibly urged upon the argument, is to the following language or part of the instruction: "A house of ill-fame is a house of bad reputation. I suppose you all well know the meanings of the words *good reputation*, and of the other words *bad reputation*."

The skill and aptitude of defendant's counsel upon the argument in disintegrating and separating the different parts of the instructions, impressed me strongly that here was a fatal error.

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Certainly if the jury were by the Court led to believe that all that was necessary to establish the defendant's guilt, was evidence that the defendant was the keeper of the house in question, and that it was a house of bad reputation in contradistinction from a house of good reputation, it would be error.

The question for the jury was not, is the house in question kept by defendant a house of bad reputation, or a house of good reputation, but was it a house of bad reputation in the sense in which it is charged in the indictment:—a house of ill fame, resorted to and visited for the purposes of prostitution?

It should be observed here that in determining the question of error in giving or refusing instructions, we must examine and pass upon the instructions as a whole and not in fragmentary parts, and from such examination determine whether the jury may have been misled, or the defendant may have been prejudiced. Applying this test, we are unable to discover that the jury could have been misled by the instructions given, to the prejudice of the defendant.

The attention of the jury is first called to the charge as contained in the indictment, which was read to them. Next they were told that every person who keeps any bawdy house, house of ill-fame, of assignation, or of prostitution, or any other house or place for persons to visit for unlawful sexual intercourse, etc., is guilty of misdemeanor. Here, then, the charge against the defendant is distinctly stated by the Court to the jury.

Next, they are plainly told what the prosecution must show to make its case, and the character and class of testimony upon which they may find the house kept by the defendant, to be such house of ill-fame.

Now, what are we to understand by *such* house of ill-fame? Manifestly, a house of the class charged in the indictment read to the jury. A house of the character and reputation, the Court has just stated to the jury, the keeping of which was a misdemeanor.

The Court then propounds the question: "was it, or was it not generally reputed to have been such house of ill-fame?"

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The word *such* is here used, referring to the kind, character and description of the house charged in the indictment—the keeping of which is a misdemeanor.

From a careful examination of the instructions, I am unable to discover that the jury may or could have been misled by the alleged erroneous words or statements made use of, simply to make plain and simplify the issues to be passed upon by the jury.

Let the judgment of the court below be affirmed, and the case remanded to the District Court of Yankton County for further proceedings according to law.

The Chief Justice and Justice BENNETT concur.

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### GRESS V. EVANS, ET AL.

1. **PROCEEDINGS: LAW AND EQUITY: DISTINCTIONS ABOLISHED.** Under the provisions of the Code of Civil Procedure, all distinction between actions at law and suits in equity, and the forms of all such actions and suits have been abolished, and a uniform course of proceeding established.
2. **APPELLATE COURT: JURISDICTION: EFFECT OF CONSENT.** The mere consent of parties cannot confer jurisdiction, unless in a very few special instances. The appellate powers of the Supreme Court are fixed by law, and can be exercised only in the modes and channels prescribed by the Codes.
3. ———: **EFFECT OF STIPULATION: UNCERTIFIED EVIDENCE.** A stipulation of parties as to testimony adduced on the trial below, in the absence of a case made or exceptions settled, will not authorize the appellate court to receive and review *de novo* such uncertified evidence.
4. **APPEAL: TRIAL TO THE COURT: CASE AND EXCEPTIONS.** Upon the trial of a cause to the Court, without the interposition of a jury, either party desiring to review upon the evidence appearing upon the trial, a question of fact or of law, must make a case or exceptions, in like manner as upon a trial by a jury, except that the Judge in settling the case is required to briefly specify the facts found by him and his conclusions of law.
5. ———: ———: ———. Cause tried to the Court, and the following general exceptions appended to the decision: "To which finding of facts, conclusions of law and the order of the Court, the defendants except." *Held:*—That on appeal from the judgment, with no case made or exceptions settled, there was nothing before the appellate court, except such papers as the clerk was au-

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thorized to attach and file as a judgment roll, to-wit: the summons, pleadings, or copies thereof and a copy of the judgment, with the findings on the facts and conclusions of law, of the Judge who determined the cause.

6. ———: INADVERTENCE OR NEGLECT. Inadvertence or neglect of parties or counsel to properly prepare a case for review, is not a matter for which the appellate court has authority to provide a remedy.
7. ———: PREPARATION OF: CONCURRENCE OF JUDGE. The presiding Judge, before whom a cause is tried is a recognized entity in making a case or in settling exceptions, and his concurrence or approbation, as a general proposition, is necessary in the formulation of either the one or the other.
8. *CONVEYANCE*: UNRECORDED: NOTICE. Actual notice of a prior unrecorded conveyance, or of any title, legal or equitable, to the premises, or knowledge and notice of any facts which should put a prudent man upon inquiry, impeaches the good faith of the subsequent purchaser.
9. ———: ———: ———. There should be proof of actual notice of prior title or prior equities, or circumstances tending to prove such prior rights, which affect the conscience of the subsequent purchaser.
10. ———: ———: ———. Actual notice, of itself, impeaches the subsequent conveyance. Proof of circumstances, short of actual notice, which should put a prudent man upon inquiry, authorizes the Court, or jury, to infer and find actual notice.
11. ———: ———: ———. Notice is either actual or constructive. Actual notice consists in express information of a fact. Constructive notice is notice imputed by the law to a person not having actual notice; and every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself.
12. ———: PURCHASER: GOOD FAITH. Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of the law, together with an observance of all information or belief of facts which would render the transaction unconscientious.

*Appeal from Minnehaha County District Court.*

THE facts are stated in the opinion.

*E. G. Wheeler*, for appellant.

The deed of Jane L. and Moses S. Titus to Byron M. Smith was not recorded and was not entitled to record for want of a certificate of the official character of the officer who took the acknowledgement at the time the defendants' deed was re-



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corded, and was not notice to the defendants. (Civil Code, 1865-6, sec. 528; 20 Wis. 523, and authorities cited: 4 Kent's Com. 174; 2 Story's Equity jur. 276; 43 Cal. 467.)

The deed of Byron M. Smith to plaintiff, R. B. Gress, though prior in date to the deed of the Titus' to the defendant Evans, is not notice to Evans or his grantees, it not being recorded until long after the deed of the Titus' to Evans.

If the defendant Evans purchased the land of Jane L. Titus and her husband in good faith for a valuable consideration without notice of the prior deed, then the deed of Titus and husband to Smith and the deed of Smith to the plaintiff Gress, are both void as to Evans and his grantees, Evans' deeds having priority of record. (Civil Code, 1865-6, page 97, §§ 530 and 531.) This is not only settled by statutes, but is the doctrine of the common law. (4 Kent's com. 173-4; 20 Wis., 523; 1 John. Ch. Rep. 300; 3 Cranch 140; 2 Cowen, 246; 2 Walter Penn. rep. 75.) As to the allegations of actual notice, the burden of proof is on the plaintiff. It devolves on the plaintiff to show that the defendants bought with actual notice of his (the plaintiff's) rights. *Scales v. Wiley*, 11 Iowa, 264.

The evidence should be clear and undoubted to charge a purchaser with notice of title in a third person. Suspicion of title is not enough. (8 John. 137-140; 14 Ill. 66.)

There is no evidence of actual notice. No evidence that either Evans or Burbank had any knowledge of the existence of the deed from Titus to Smith or from Smith to Gress. The doctrine of constructive notice does not apply, because the defendant Evans did make diligent enquiry of Smith, the proper person, but failed to obtain any answer whatever. (Civil Code, §§ 2009-10-11; Cal. Civil Code, 12 and note; 3 Cal. 179; 15 N. Y., 354; 4 Kent's com. 179; 19 Wend., 574; 4 Kent's com. 465.)

That the defendants bought the land in good faith for a valuable consideration. (Civil Code, sec. 2007; 4 Kent's com. 465.)

The relinquishment by Evans of his right by occupancy or (squatter's right) to this same land to the Titus' as shown by

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the deed of Titus and wife to Evans, by their attorney, Smith, is a valuable consideration for that deed, which deed establishes in Evans an equitable estate or interest in the land. The payment of the money to Mrs. Titus, though small in amount, is also a valuable consideration. (Hilliard on R. E. 276-7: 4 Kent's com. 462-3-5; 3 Wash. on R. P.)

The registry of a deed is of no validity if such deed is defective through the want of some statutory requisite. (2 Hilliard 437, sec. 83.)

The Legislature has authority to confirm deeds defectively executed, but cannot affect vested rights. (2 Hilliard, 405.)

A deed of all the grantors' right and title to land, conveys the land itself, and this is the proper form of quit-claims of an estate in lands. (3 Wash. on R. P., 314 and 417; 33 N. H. 22; 34 Miss., 18; 22 Vermont, 104; 5 Iowa, 66; 11 N. H., 74; 23 Texas, 614; *Graf, et al, v. Middleton*, 43 Cal., 341; *Jackson v. Fish*, 10 Johnson, 456.)

The words "grant, bargain and sell" in a deed, amount to a covenant that the grantor has done no act, nor created any incumbrances whereby the estate granted by him might be defective. That the estate was indefeasible, as to any act of the grantor. (3 Wash. R. P. 417.) This construction is approved by Chancellor Kent, *ibid*; 32 Ill., 348; 5 Iowa, 62.

No presumption of notice can arise from the absence or presence of covenants in a deed. (Rawle on covenants for Title.)

An after acquired title enures to a grantee under a quit-claim deed where the granting words are "grant, bargain, and sell." Statute 1862, page 67, sec. 3; 32 Ill., 348.)

*Edward H. Brackett*, for same.

This is purely a case in chancery, as at common law, governed by the Organic act, and as such, no bill of exceptions is required, or assignment of error, either the one or the other, as by stipulation *all* of the evidence appears in the record of the cause. The Act of Congress of 1874, allowing or permitting a Code practice is merely permissive or curative;

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hence at common law a bill of exceptions in a *chancery* cause is unheard of and unknown. The case being not a jury case is determined in the appellate court solely on the body of the record. The case is, therefore, legitimately now before the court for its final adjudication and determination. And the points now made on argument are:—

That the deed of August 11th, 1860, of Byron M. Smith, as attorney in fact of Jane L. Titus and Moses S. Titus, whether a quit claim or not operated as an equitable adjustment of the scrip, and renders the title or claimed title of Smith or his grantee, the plaintiff, the mere trustees of Evans.

That the deed of 11th of August, 1860, having been executed by Byron M. Smith, as the assumed attorney in fact of Jane L. Titus, the scribee; and the said Smith being the grantor of the plaintiff Gress, both Smith and the plaintiff are effectively and forever estopped from asserting or claiming title to the land in contest. (*Lee v. Griffith*, 26 Ills., 76.) The deeds, each and all are deeds of bargain and sale, and not of mere release, and they are all therefore statutory deeds, as effectual as those of livery of seizin at common law; and hence that any and *all subsequently* acquired title *enured* to their support. (*King v. Gilson*, 32 Ills., 348; *Brown v. McCormic*, 6 Watts, 60; *Shaw v. Gilbert*, 7 Bass, 111; *Root v. Cook*, 7 Penn. St., 380; *Cotton v. Ward*, 3 Mo., 304; *Reese v. Smith*, 12 Mo., 344; 4 Gibon, 350; 4 Scan., 65.) In conclusion of the opinion in 4 Gibon, 353, the Court say: "Upon a careful view of all the authorities we are clearly of the opinion that the title subsequently acquired did enure to Hillman," *i. e.*, in virtue of a statutory deed of bargain and sale, *i. e.*, quit claim. See, also, Washburn on Real Property, pages 473 and 417, and notes 1, 3, 5, 6, and the various authorities there cited.

We claim that the cases of *Oliver v. Piatt*, *Jackson v. Brown*, and *May v. LeClair*, decided by the U. S. Supreme Court and referred to in the learned opinion of his honor the Judge of the district, are each and all of them causes arising merely from past relations, and have no applicability to the case at bar.

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That the Minnesota decisions referred to are not *good law*, but bad law—entirely destructive to land titles, and not to be followed by this supreme appellate tribunal in determining Dakota land titles.

*C. J. B. Harris*, for appellee.

Nothing passed to Evans by the quit claim deed executed in 1860, as no title was obtained to the land until December, 1863. (*White v. Brown*, 14 Ohio St., 343, and authorities under 4 Point.) The offer of Smith when he located the scrip in December, 1863, to give Evans 40 acres, cannot be enforced, because not in writing, and is merely the offer of a gift. E. had no interest in the land; his improvements had been burned and he had removed to Yankton; abandoned the land and told Smith he might scrip it, before S. offered him the 40 acres. At most, it only created a moral obligation from which S. was excused when E. refused to make good his legal obligations to S., amounting to about \$300.

Plaintiff obtains title from Smith, and Smith from the patentee by deed dated March 31, 1869. This being the first deed executed by the patentee, it must prevail over any subsequent deed executed by her, except to a purchaser of the *same* property in *good faith* and for a *valuable consideration*, whose deed is first duly recorded. (Civil Code, § 530.) Evans claims title by quit claim deeds; hence he cannot be regarded as a purchaser in *good faith* of the *same* property, although his deeds have been first recorded. (*Brown v. Jackson*, 3 Wheat., 449; *Martin v. Brown*, 4 Minn., 283, 292; *Hope v. Stone*, 10 Minn., 141; *Everest v. Ferris*, 16 Minn., 26, 27, 28, 32; *Marshall v. Roberts*, 18 Minn., 405; *Johnson v. Robinson*, 20 Minn., 189; *Oliver v. Piatt*, 3 How., 410; *May v. LeClair*, 11 Wall., 232, 217, 220-1; *Vattier v. Hinde*, 7 Pet., 252; *Boon v. Chiles*, 10 Pet., 177; *Rogers v. Burchard*, 7 American R., 283; *Way v. Lyon*, 3 Blackf., 76; *Coe v. Persons Unknown*, 43 Me., 432; *Walker v. Lincoln*, 45 Me., 67; *Doe v. Reed*, 5 Ills., 117; *Smith v. Bank of Mobile*, 21 Ala., 125; *Sherwood v. Barlow*, 19 Conn., 471; *Stoffel v. Schroder*, 62 Mo., 147; *Mann v. Best*, 62 Mo., 491; *Young v. Clippinger*, 14 Kans., 148; *Watson v. Phelps*,

40 Iowa, 482; *Mauwaring v. Terry*, 39 Texas, 67; *Carter v. Wise*, 39 Texas, 273.) The statutes referred to in the foregoing decisions are mostly identical with ours, especially in Minnesota.

Evans could convey no title to Burbank, as his deeds upon their face are sufficient notice to B. of the infirmity of his title. See authorities cited under last head, especially *Marshall v. Roberts*, and *Carter v. Wise*.

The evidence shows conclusively that Evans took his deeds with notice, and not for a valuable consideration.

Burbank admits in his deposition that he had actual notice of facts sufficient to put him upon inquiry, and that he did nothing except to examine the records. (*Sigourney v. Munn*, 7 Conn., 324; *Hawkinson v. Barber*, 29 Ills., 80; *Dickinson v. Breeden*, 30 Ills., 279; *Rupert v. Mark*, 15 Ills., 540; *Harper v. Reno*, 1 Freem., (Miss.) Ch. 323; *Warren v. Swett*, 31 N. H., 332; *Hart v. Bank*, 33 Vt., 252; *Wilson v. Hunter*, 30 Ind., 466; *Williamson v. Brown*, 15 N. Y., 354; *Fassett v. Smith*, 23 N. Y., 252; 24 Ind., 429; 8 Conn., 389; 3 N. J. Eq., 36; 4 Blackf., 383; *Eck v. Hatcher*, 58 Mo., 235; *Shortwell v. Harrison* 30 Mich., 179; *Monroe v. Eastman*, 31 Mich., 283.) There were no implied covenants when Evans took his deeds. (Sec. 489, Civil Code.)

SHANNON, C. J.—The proceedings in this action, until the appeal, were under the Code of Civil Procedure of January 10th, 1868, by which the distinction between actions at law and suits in equity, and the forms of all such actions and suits were abolished, and but one form of civil action was established. The preamble to that Code asserts that the distinction between legal and equitable remedies should no longer continue, and that a uniform course of proceeding, in all cases, should prevail. Doubts having been entertained whether, under the Organic acts creating this and other Territories, the Codes adopted therein which authorized a mingling of common law and chancery jurisdiction in the same proceeding, or a uniform course of proceeding in all cases legal and equitable, were repugnant to the Organic acts, Congress, by an

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act approved April 7, 1874, removed all such doubts by confirming such Codes, and by authorizing *such uniform course of proceeding*.

The trial in this action was by the Court at May term, 1875, and its decision, in writing, was given June 20th, 1875. To the decision is appended the following general exception, to-wit: "to which finding of facts, conclusions of law, and order of the Court, the defendants except." Judgment upon the decision was sometime afterward duly entered.

It is to be observed that no further proceedings were had until the notice of appeal was served and filed on 24th of April, 1877, nearly two years after the judgment. The appeal is from the whole of the judgment, and brings up the judgment roll proper. And here the first question arises.

Counsel for appellants contend that, under the general exception (noted above) to the decision of the court below, and in the absence of a case made or exceptions settled, or any attempt, in the District Court, to re-examine the facts found, this appellate court is bound to receive, and to review, *de novo*, the mass of uncertified evidence which has been laid before us; and moreover that a certain stipulation bearing date the 21st of May, 1877, gives this court jurisdiction so to do.

The answer to this is, that the mere consent of parties cannot confer jurisdiction, unless in a very few special instances. The appellate powers of this tribunal are fixed by law, and can be exercised only in the modes and channels prescribed by the Codes. No matter what may have been the past practice, here or elsewhere, now a uniform course of procedure to secure a review on appeal, is plainly marked out, and must be pursued. This means that the same steps requisite to obtain a review in an action purely legal, must likewise be taken in a case purely equitable. If the counsel who tried the cause believed the findings were incorrect, or that the evidence was insufficient to justify the decision, the remedy under the Code then existing was simple and obvious. Under it, when the trial was by the Court, either party desiring to review, *upon the evidence appearing upon the trial*, a question of fact or of law, could make a case, or exceptions, in like

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manner as upon a trial by a jury, except that the Judge, *in settling the case*, was required briefly to specify the facts found by him, and his conclusions of law. Nothing like this was done, or was even attempted to be done. No effort of any description was made to introduce the evidence, or any part thereof, within the judgment roll. Consequently, such essentials being wanting, there is nothing before us, on this appeal, except such papers as the clerk was authorized to attach and file as a judgment roll, to-wit: the summons, pleadings, or copies thereof, and a copy of the judgment, with the findings on the facts and conclusions of law of the Judge who determined the cause. And this is so whether under the old or new Code of Procedure; for in both, the constituents of a judgment roll are identical, and the latter also provides for a case or exceptions. But if, after such lapse of time, anything further to remedy omissions was permissible under the present Code, it is sufficient to state that no such step has been taken. Inadvertence or neglect of parties or counsel to properly prepare a case for review, is not a matter for which this court has authority to provide a remedy. The law helps the vigilant, before those who sleep on their rights.

It should furthermore be borne in mind that under both Codes the Judge is a recognized entity in making a case, or in settling exceptions. His concurrence or approbation, as a general proposition, is necessary in the formulating of either the one or the other. In his absence, and without his knowledge or consent, attorneys cannot do this for him, especially when nearly two years have run from the termination of a trial. These remarks are naturally suggested by the anomalous proceedings before us; for among the batch of so-called uncertified evidence thrust upon our attention, there is a certain portion which, most manifestly, was never offered in the trial court. Altogether, the case as thus attempted to be made up very much resembles an agreement to submit facts in controversy to this court in the first instance, which were not heard or determined in the District Court. We must therefore take the record as it legally comes before us, and ascertain what, if any, errors are in it. The case as thus pre-

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sented is upon the original report of the Judge, and we are to assume the same facts as found by him. The general rule is, that every presumption is to be indulged in favor of a judgment; and this court will not look into evidence which is not authenticated, to find a fact for the purpose of reversing a judgment.

The action was brought to quiet plaintiff's title to the S. E. quarter of section nine, in township one hundred and one, of range forty-nine, and to remove a cloud from his title caused by certain deeds executed and delivered to defendants for said land, and which were by them placed on record before the plaintiff's deeds were recorded. The findings of the Judge are, that "the land in controversy was entered by what is known as Indian half-breed scrip, in the name of Jane Titus, at the Vermillion land office, in December, 1863, and a patent issued therefor by the United States government, bearing date February 1st, 1868, which was filed for record in the office of the register of deeds of Minnehaha county, D. T., May 14th, 1872. Plaintiff claims title under deed, quit claim in form, executed by Moses S. Titus and Jane L. Titus, his wife, to Byron M. Smith, dated March 21st, 1869, filed for record in Minnehaha county, May 14th, 1872; and deed from Byron M. Smith and wife to plaintiff, dated April 7th, 1870, and filed for record in Minnehaha county, May, 1875. Defendants claim title under two certain deeds, executed by Jane L. Titus and Moses S. Titus, her husband, in form quit claim, with special covenants, one dated May 17th, 1871, and filed for record May 23d, 1871, and the other bearing date August 11th, 1871, and filed for record September 18th, 1871; and deed from defendant Evans to defendant Burbank, warranty, for the north half of said tract, executed September 2d, 1871, and filed for record in Minnehaha county, October 4th, 1871."

As to the title of the plaintiff, Gress, the Judge found "that the chain of title from the general government to plaintiff is complete, and the deed from Byron M. Smith to plaintiff vested in him absolutely the fee-simple title, where it still remains unless it has been divested by the subsequent conveyances to defendants." And as to these, it is further found



that "the deeds from Jane L. Titus and Moses S. Titus to Evans, and from Evans to Burbank, were executed and delivered subsequent to, but recorded before the deeds to Smith and from Smith to plaintiff."

And this, from the pleadings themselves, is the substantial paramount point in the whole controversy. The complaint substantially alleges fraudulent designs and intentions on the part of the defendants in procuring and recording their deeds, and charges that before the dates of their deeds they had full, complete, and actual notice of the prior unrecorded deed from the Tituses to Smith. The defendants, in their answers, deny all fraudulent purposes, and assert that they were purchasers in good faith and for a valuable consideration, and had no notice, either actual or constructive, and claim that they should be protected. The defendants having, admittedly, their deeds first duly recorded, the direct and vital issue before the trial court was:—were the defendants purchasers in good faith and for a valuable consideration? Had they notice either actual or constructive?

Upon this issue the findings are, that "the deed from Jane L. and M. S. Titus to Evans, dated May 17th, 1871, as before stated, is in form a quit claim—'by these presents grant, bargain, sell, release, and quit claim \* \* \* all their right, title, interest, claim, or demand. \* \* \* To have and to hold the above quit claimed premises \* \* \* so that neither the said party of the first part, their heirs or assigns, shall have any right, title, or interest in and to the aforesaid premises.'" "The second deed to Evans, dated August 11th, 1871, is the same in form, with the exception of the covenants which are as follows: 'and the said party of the first part \* \* doth covenant with the said party of the second part \* \* \* that they have not made, done, or executed, or suffered any act or thing whatsoever whereby the above premises, or any part thereof, now are, or at any time hereafter shall or may be imperilled, charged, or incumbered in any manner whatsoever.'"

The next important finding is:—"that Evans was not a purchaser in good faith, but that he obtained his deed by

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fraud and misrepresentation." And again that "it is disclosed by the evidence that Mr. and Mrs. Titus were induced to make this deed by the representations of Evans that he was the person entitled to it; that he was the owner of the land, but that there was some defect in his title which he wished remedied," etc. And furthermore it is found, that "when he" (Evans) "applied to Mr. Titus for a deed he was told by Titus that *they had sold the scrip, and that they did not claim any right in the land, that they considered the land sold so far as they were concerned.*" To this the Judge immediately adds as follows: "Evans knew he was not the purchaser of the scrip, or his assignee, and he made no inquiry as to who had purchased the scrip, or whether they had previously executed a deed.

There is another finding relative to non-inquiry from Smith, which concludes by stating that Evans "at no time asked him" (Smith) "if he had received a deed, although from previous conversations he must have known that Smith had, or claimed to have, some interest in the land."

But as to the defendant, Evans, there is yet another significant finding, which is as follows: "The evidence clearly establishes the fact that he" (Evans) "paid no consideration whatever. No consideration was mentioned or alluded to. After the deed was executed and delivered, Evans made a present to Mrs. Titus of ten dollars, as he then stated, to compensate them for their trouble. It was neither given nor received as a consideration for the deed. The grantors neither asked nor expected anything, but made the deed to Evans because they supposed him to be the party entitled to it, and for the purpose of curing some defect in his title."

Such are the prominent findings of fact in relation to the defendant, Evans, on the issue of his being a purchaser in good faith and for a valuable consideration. And we must next turn attention to the findings regarding the other defendant, Burbank. As to him, the Judge has found as follows, to-wit: "He" (Burbank) "admits that he was told that Smith had a power of attorney from Titus and husband to locate certain scrip upon the land in controversy, *and might*

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*hold a power of attorney to convey said land, or a deed to the same.* It does not appear that he made any effort to find out anything further in relation to the matter, except to examine the records. He did not inquire of Smith, or attempt to ascertain his address or anything of the kind. It does not even appear that he was ignorant of Smith's whereabouts, or that he might not have readily applied to him for information. He claims to have inquired of others, but their names he does not disclose.

From these findings, the trial court deduced the conclusions that "Burbank cannot stand as a *bona fide* purchaser without notice," and that Evans was in the same position; and that "the equities of this cause are with the plaintiff, and that the deeds to defendants are fraudulent and void as against him." Is there any error in this?

Our Civil Code makes void a conveyance not recorded, only as against a subsequent purchaser of the same property, or any part thereof in good faith and for a valuable consideration. (See Civil Code of 1866, § 530; Revised Codes, page 341, § 671.) Actual notice of a prior unrecorded conveyance, or of any title, legal or equitable, to the premises, or knowledge and notice of any facts which should put a prudent man upon inquiry, impeaches the good faith of the subsequent purchaser. There should be proof of actual notice of prior title, or prior equities, or circumstances tending to prove such prior rights, which affect the conscience of the subsequent purchaser. Actual notice, of itself, impeaches the subsequent conveyance. Proof of circumstances, short of actual notice, which should put a prudent man upon inquiry, authorizes the Court, or jury, to infer and find actual notice.

Or to express it exactly, good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of law, together with an absence of all information or belief of facts which would render the transaction unconscientious. And notice is either actual or constructive. Actual notice consists in express information of a fact. Constructive notice is notice imputed by the law to a person not having actual notice;

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and every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself. (Civil Code of 1866, §§ 2007-8-9-10-11; Revised Codes, pages 504-5, §§ 2105-6-7-8-9.)

Viewed in the light of this law on the subject, from the findings, clearly the plaintiff's unrecorded conveyances were not void as against Evans; and as the admissions of Burbank are to be taken most strongly against himself, he must be considered as having had notice of circumstances sufficient to put a prudent man upon inquiry, and having omitted to make such inquiry with reasonable diligence, he must be deemed to have had constructive notice of the fact itself.

The learned Judge who tried the issues, arrived at a conclusion of law which in a case like the present, so pregnant with other overshadowing circumstances, it is unnecessary now to examine or determine. He was of opinion that by a deed which (like those to Evans) simply purports to pass "the right, title, interest, claim, or demand" of the grantor, the grantee does not obtain anything which the grantor had previously parted with, although the subsequent deed was first recorded; that such grantee cannot be regarded as a *bona fide* purchaser without notice; that, therefore, Burbank took nothing under his deed from Evans, as Evans had nothing to convey, and that the terms of the quit claim conveyances to Evans were, of themselves, notice to both Evans and Burbank. (*Brown v. Jackson*, 3 Wheaton, 450; *Oliver v. Piatt*, 3 How., 396; *May v. McClair*, 11 Wallace, 232; *Smith's Heirs v. Bank of Mobile*, 21 Alabama, 124; *Rogers v. Burchard*, 34 Texas, 441; *Bragg v. Paulk*, 42 Maine, 502; *Walker v. Lincoln*, 45; Maine, 67; *Doe v. Reed*, 5 Ills., 117; *Coe v. Persons Unknown*, 43 Maine, 452; *Martin v. Brown*, 4 Minn., 282; *Everett v. Ferris*, 16 Minn., 26; *Marshall v. Roberts*, 18 Minn., 405. But see *Graff v. Middleton*, 43 Cal., 341; *Jackson v. Fish*, 10 Johns., 456; 3d Wash. on R. P., 314, 417; 33 N. H., 22; 34 Miss., 18; 22 Ver., 104; 5 Iowa, 66; 11 N. H., 74; 23 Texas, 614, and other authorities cited.)

It would seem there is much in the authorities quoted, although they are somewhat conflicting, to sustain the positions assumed by him. At all events, whatever the fact may have amounted to, Burbank was cognizant from the records that his grantor had only "the right, title, interest, claim or demand" of *his* grantors, in and to the land.

In the case as properly before us, there is another point which claims attention. The defendants in their answers set up a certain quit claim deed, with special covenants of warranty, purporting to be executed by Moses S. Titus and Jane L. Titus, his wife, by Byron M. Smith, *their attorney in fact*, bearing date August 11th, 1860, conveying all *their right, title, interest, claim and demand* in and to the middle one-third of the S. W. quarter of said tract, and also one undivided third of the north half of said tract, with other land not involved in this suit.

As to this matter of defense, the findings of the judge are: First, that "at the date of its execution, the grantors had no interest whatever in the land." Secondly, that "there is nothing to show that Byron M. Smith was the attorney in fact of Mr. and Mrs. Titus, or had any authority from them to act in the premises."

This deed purports to have been made anterior to all our statutes and Codes. The Organic act itself was not approved until the following year. Assuming, however, that the rule at the time the conveyance was made, was like the rule of the common law, the power to execute the deed must itself have been by an instrument under seal. Certainly, at least, some instrument in writing, and capable of being recorded, was requisite. A power of attorney was a necessary link in the chain of title. Of what value was the deed, if there was no evidence of any authority to make it?

The last finding discloses an entire failure of proof as to its being the deed of Mr. and Mrs. Titus; and in weighing the case, it was very properly thrown out of the scales.

The copious briefs and arguments as to the construction, force and effect of this instrument, and as to whether its covenants enlarged the estate conveyed, so that the title after-

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wards acquired by Jane Titus vested in the grantee, are palpably useless and supererogatory, for we cannot be called upon to interpret that which a party has entirely failed to prove, and which is therefore as much outside of the case as any instrument between strangers to the action.

An objection of defendant's, taken on the trial is incorporated in the decision of the judge, and relates to the introduction in evidence of the deed of Moses S. and Jane L. Titus to Byron M. Smith. It was that "the certificate of acknowledgment is not in the form required by the statutes, as it does not show that the wife was examined separate and apart from her husband;" and secondly, that "there is no certificate of the official character of the notary before whom the deed purported to have been acknowledged."

The Court overruled the objection, remarking that "as between the parties to the deed, a certificate of acknowledgment is not essential. The signatures to, and execution of the deed were proven by parol evidence, and the defect has been cured by an act of the Territorial Legislature, approved January 6th, 1873, which makes the deed admissible in evidence. It is not necessary here to discuss the point as to what effect this act might have on the question of constructive notice, for under the evidence it is quite clear that the records furnished defendants no notice of plaintiff's rights, at the dates of their respective purchases.

We observe no error in overruling the objection. It was not necessary (as correctly stated by the judge) to determine the applicability or efficacy of the statute indicated, as to the question of notice; for that deed was not recorded until May 14th, 1872, and it was to be considered in the same light as a prior unrecorded deed. It is to be presumed from the findings that this conveyance was executed and acknowledged not within, but without the Territory.

From all the findings, embracing as they do, all the issues, the judgment of the said district court was warranted, and it must be

AFFIRMED.

Mr. Justice BENNETT concurs; Mr. Justice BARNES non-concurring.

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NOTE.—Of authorities examined:—As to review on appeal, a judgment rendered upon a trial by the Court, a case must always be made; see *Hunt v. Bloomer*, 13 N. Y., 3d Kernan, page 341; *Newton v. Bronson*, *ibid*, page 587. As to a deed of bargain, sail, and quit claim of the right, title, interest, and estate, see *Touchard v. Crow*, 20 Cal., 150; *Muller v. Boggs*, 25 Cal., 186. As to subsequently acquired property, in case of deed of the right, title, interest, etc., see *San Francisco v. Lawton*, 18 Cal., 476; *Gee v. Moore*, 14 Cal., 472; *Morrison v. Wilson*, 30 Cal., 344; *Cadiz v. Majors*, 33 Cal., 289; *Barrett v. Briggs*, 50 Cal., 655; *Dalton v. Hamilton*, 50 Cal., 423. See, also, *Bigelow on Estoppel*, 335, 346; *Washburne on Real Prop.*, Vol. 3, page 404.

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2	45
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5	87
5	153
46*	592
2*	260
3*	311
37*	306
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1. **OFFICER EX-OFFICIO: BOND: LIABILITY.** The statute provided for the election of a judge of probate, fixed his bond, and further provided that he should be *ex-officio* county treasurer. *Held*:—That his bond as judge of probate covered his duties as county treasurer, and that he and his sureties would be liable thereon for any breach of its conditions in the discharge of the duties of either office.
2. **PRACTICE: DEMURRER: DEFECTS IN COMPLAINT.** Upon the argument of a demurrer to an answer the defendant may attack the complaint upon the grounds that the court has no jurisdiction, or that the complaint does not state facts sufficient to constitute a cause of action. And if it appears that the objections thus raised are well taken, the defendant will be entitled to judgment, notwithstanding the defects in the answer.
3. —: **COMPLAINT: ESSENTIAL AVERMENTS.** The words "facts constituting a cause of action," as used in the Code of Civil Procedure, mean those facts which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of the facts.
4. —: —: —. Every fact which the plaintiff must prove, to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred and set forth according to their legal effects and operation, and not the evidence of those facts, nor arguments, nor inferences, nor matters of law only.
5. **PUBLIC OFFICER: DUTY TO ACCOUNT: DEMAND.** When the law makes it the duty of a public officer, in retiring from office, to account and make return to the proper authorities, and to deliver to his successor in office all public records, books, papers and funds pertaining to his office; upon failure or refusal to do so, no demand is necessary before bringing suit.
6. —: **BOND: CONDITIONS.** The bond of a judge of probate and *ex-officio* county treasurer was conditioned that "he shall well and faithfully, and impartially perform the duties and execute the office \* \* without fraud, deceit, or op-

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pression." *Held*:—That his liability was that of an insurer, and not measured by the law of bailments, and that he was bound, not to exercise due care and diligence in the discharge of his duties, but to perform them absolutely, without conditions or exceptions, unless prevented by an irresistible super-human cause, or by the act of a public enemy.

7. **IRRESISTABLE SUPER-HUMAN CAUSE: IN WHAT IT CONSISTS.** The words "irresistable super-human cause," are equivalent to, and are used in the same sense as "act of God," and consists in natural necessity, as wind and storms which arise from natural causes, and which operate without any aid or interference from man, and is distinct from inevitable accident.
8. ———. **ACCIDENTAL FIRE: EXCUSE.** Accidental fire, not caused by lightning, is not an irresistible super-human cause, and will not excuse from the performance of an obligation, unless especially so stipulated, or when the party is bound only to the exercise of reasonable care and diligence.
9. **PUBLIC FUNDS: SAFE KEEPING: LIABILITY OF TREASURER.** The fact that a county fails to furnish a *safe*, on request of the county treasurer, is no excuse for the non-performance of his obligation. He becomes personally responsible, and in the absence of any statutory provision, must provide for the safe keeping of the funds and property coming into his hands.

*Appeal from Union County District Court.*

THIS is an action brought on the official bond of defendant Simonsen, the conditions of which are as follows: "Whereas the above bounden, R. J. Simonsen, has been duly elected to the office of probate judge of the county of Clay, in the Territory of Dakota aforesaid, at the regular annual election in and for said county, on the second Tuesday of October, A. D. 1874. Now, therefore, if the said R. J. Simonsen shall well and faithfully and impartially perform the duties and execute the office of probate judge of the said county of Clay, during his term in said office, by virtue of said election, as aforesaid, without fraud, deceit, or oppression, then the above obligation to be void and of no effect, otherwise to remain in full force."

Simonsen entered upon the duties of said office on the 4th day of January, 1875, and held the same until about the 20th of the same month, when he resigned and his successor was appointed, qualified and entered upon the duties of said office. That during that time there came into his possession as such probate judge and *ex-officio* treasurer of said county,



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all the books, records and papers pertaining thereto, and a large sum of money belonging to the different funds of said county.

On or about the 15th day of January, 1875, the building in which said Simonsen kept his office, took fire and burned down, whereby all of said books, records and papers, including, as defendants allege, the money belonging to plaintiff, were consumed and wholly destroyed. It is alleged in the complaint that the burning of said office with its contents, was through the negligence, carelessness and want of proper diligence on part of defendant Simonsen, which is denied in the answer.

No settlement or accounting was ever made by Simonsen with plaintiff, and none of said books, records or papers, nor any of the money belonging to plaintiff, nor any part thereof, was ever turned over and delivered by Simonsen to his successor in office.

No adjustment of Simonsen's accounts by the county commissioners, nor any demand on Simonsen is alleged or pleaded in the complaint.

Defendants set out in their answer that the paper sued on, purporting to be a bond, is not such a bond as the statute required defendant to execute, and that it was required by the county commissioners of Simonsen and his sureties in violation of the provisions of the statute. It is further alleged in the answer that Simonsen repeatedly requested the agents of plaintiff to procure for him a safe in which to keep the books, papers and money pertaining to his office, but that they refused.

To the answer plaintiff interposed a general demurrer, which was by the Court sustained, *pro forma*, and defendants appeal.

*J. P. Kidder, J. L. Jolley and Bartlett Tripp*, attorneys for appellants.

This case comes up on demurrer to the answer which, of course, reaches back and puts in issue every defect of the complaint, in which it does not state facts sufficient to constitute a cause of action.

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Plaintiff alleges: "That on or about the 13th day of January, 1875, the said R. J. Simonsen did carelessly, negligently and of his own fault, and for the want of proper care and attention on his part, permit the building in which he kept his said office, to take fire and burn down. That through the neglect and carelessness of said R. J. Simonsen, all the books, records, papers and documents pertaining to his said office, the property of the plaintiff, were then and there wholly consumed by fire."

Plaintiff further alleges: "That thereafter, to-wit: on or about the 22nd day of January, 1875, defendant, R. J. Simonsen, resigned his said office to the Board of County Commissioners of said county, who thereupon appointed as his successor in said office William Shriner; that said William Shriner has long since filed his bond, properly approved, as the law directs, and entered upon the discharge of the duties of said office, but that said R. J. Simonsen has failed and refused, and still fails and refuses to account for said money, books, records, papers and documents, or any part thereof, or to deliver the same to his successor in office, or to any other person or persons authorized by law to receive the same."

These are the only breaches alleged in the complaint. As to the first of these, the answer admits that the records, etc., were consumed by fire, but denies the negligence.

Plaintiff demurs to the answer, the effect of which is to admit that all the money, records, etc., were consumed without any negligence on the part of Simonsen, so that the only breach of this bond assigned and raised by the demurrer is that he has failed and refused to account for said property, or to turn over the same to his successor in office.

This allegation is not sufficient. It is true the act of 1868-9 page 175, § 36, "requires the treasurer to render his accounts to and settle with the county commissioners at the time required by law, and pay into the county treasury any balance which may be due the county, 'and order suit to be brought in the name of the county therefor.'"

But the next section provides that "if he neglect or refuse so to do, the commissioners shall adjust the accounts of such delinquent according to the best information they can obtain, and ascertain the balance due the county, and order suit to be brought in the name of the county therefor."

Section 98 of the revenue law, 1868-9, page 302, also provides, "that each county treasurer, on going out of office, shall deliver to his successor in office all public moneys, books, accounts, papers and documents in his possession; and in case of his death, his legal representatives shall, in like manner, deliver up all such moneys, books, accounts, papers and documents as shall come into their possession."

And section 99, following, provides: "If any county treasurer shall fail to make return, fail to make settlement, or fail to pay over all money with which he may stand charged, at the time and in the manner prescribed by law, it shall be the duty of the county clerk, on receiving instructions from the territorial auditor, or from the county commissioners of his county, to cause suit to be instituted against such treasurer and his sureties, or any of them, in the district court of his county."

Section 80, same act, page 296, provides for semi-annual settlements with the treasurer, on the first Mondays of May and October of each year, but further provides "that the county commissioners may require the county treasurer to settle with them at any time." And provides the manner of settlement, requiring the vouchers to be left with them for evidence of settlement, and closes with the provision that "if the treasurer's accounts are correct, the commissioners shall certify the same; if not, he shall be liable on his bond."

These provisions clearly point out the proceedings necessary to establish a breach of the treasurer's bond, and these steps must be strictly taken. As the Court, *Sixon v. Kelly* say: "The rule of law is settled that statutes conferring power upon municipal officers must be strictly construed, and the doctrine that municipal bodies can exercise only such powers as are especially granted them, or such as are necessary to carry into effect the powers expressly granted, is too well settled to cite authorities in support of it. (3 Neb., 104.)

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Dwarris lays down the rule: "Where a new right, or the means of acquiring it, is given, and an adequate remedy for violating it is given in the same statute, the injured parties are confined to that remedy." (13 Barb., 209; 1 Mann, 193; 32 Me., 553; 7 Hill, 575.)

"If the statute confers a right, and prescribes an adequate remedy for protecting it, the party is confined to statutory remedy." "If the enforcing tribunal is specified, the designation forms a part of the remedy, and all others are excluded." (4 Burr, 1322; 13 Barb., 209; Potter's Dwarris, 286, n. 5.)

And Chief Justice Parsons lays down the rule very clearly and tersely in *Franklin Glass Co. v. White*: "When a statute gives a new power, and at the same time gives a means of executing it, those who claim the power can exercise it in no other way." (14 Mass., 286-9.)

A county has no power to bring suit, only as such power is conferred by statute, and the statute must be strictly followed.

The Legislature has conferred upon the county commissioners the right to take a bond, and to have suit instituted for a breach thereof, but in the same statute it has fully pointed out the steps to be taken to establish such breach. It is not sufficient to allege that defendant Simonsen fails and refuses to account for said property, or to deliver over the same to his successor in office, and demand the full penalty of the bond. The amount due from the treasurer must be liquidated, and liquidated in the manner pointed out by the statute, before a breach can be declared, and suit brought upon the bond. The complaint must allege a settlement with the treasurer, and a failure to pay over, or that he neglected or refused to settle, and the adjustment of his accounts by the county commissioners, according to the best information they can obtain.

This precise point seems to have arisen in Arkansas, where the statute is almost precisely our own, differing only in this: that their board of county commissioners is called a "court." and appeals are taken from their decision the same as we appeal from the decision of the board to the district court. The syllabus of the case is as follows:

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"In a suit on a collector's bond, for failing to pay over the county revenue after he had collected it, the declaration must contain an averment either that the collector had settled with the county court, and failed to pay over the amount due, or that he failed to settle, and that the county court proceeded to adjust his account, and rendered judgment against him. An adjudication by the county court is conclusive evidence against the securities, as well as the collector, in an action upon his bond in the circuit court." (15 U. S. Dig., 95, §§ 40-41; *Jones v. State*, 14 Ark., 170.)

This case is followed in a later case in the same state, (*Lee v. State*) and the same principle enunciated. Citing and approving *Jones v. The State*, (22 Ark., 231-235.)

By section 25, chap. 23, laws of 1862, page 258, in which the probate judge is made *ex officio* county treasurer, he is required to report to the board of county commissioners on the first Monday of June of each year the amount of county funds in his hands, and as often thereafter as demanded of him. (1862, page 258, § 25.)

There is no *allegation* in this complaint of any demand upon the treasurer to report the funds in his hands; and these sureties cannot be charged with a breach of their principal's undertaking until the obligees show the Court that they have done all that was incumbent upon them by the statutes. In Mississippi, where it seems the treasurer is bound to pay over the moneys in his hands upon warrants drawn upon him by the county court, it was held that "a petition which charges that the county treasurer has received money which he neglects and refuses to pay over to the county, does not sufficiently assign a breach of the bond. It must aver that warrants have been drawn upon him by order of the county court." (15 U. S. Dig., 92, § 67; 17 Miss., 503.) It is claimed by the plaintiff that although this is not a statutory bond, yet it is good as a voluntary or common law bond.

The laws of 1862, chapter 23, page 258, section 22, require the probate judge before he enters upon the duties of his office to execute to the board of county commissioners a bond in the penal sum of \$4,000. The bond required of the probate

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judge and given by him, was in the penal sum of \$8,000, or double the amount required by statute. There are a number of cases that hold that a bond given for a larger amount than the statute requires is absolutely void. This is the doctrine of the *United States v. Morgan*, 3 Wash. C. C., 10; and the same doctrine is held in *Stewart v. Lee*, 3 Call.; and in the *United States v. Speake*, 9 Cranch, 28.

The only case holding the contrary of this doctrine so far as I have been able to discover is, *State of Nevada v. Rhoades*, 6 Nev., 352, where the court hold that a treasurer's bond given for \$102,500, where the statute required a bond for only \$100,000, which was given voluntarily, by mistake or otherwise, was not void, the jury having given verdict for \$100,000; but in that case, while this was one of the points raised by counsel for reversing the case, and the court in fact, pass upon this question, yet the court does reverse the case upon other grounds so that the opinion of the Court upon this question is really but dictum after all.

But we do not rest our case upon the allegation that the bond was for an amount greater than required by statute, but we say it was not a voluntary bond; it was extorted from the defendant Simonsen, under color of office; it was made a condition precedent to his holding the office and receiving the emoluments thereof, and is therefore not voluntary, and is void. The courts have held in all cases of appeal in criminal cases where the bond is required for a larger sum, or is more oppressively conditioned than is required by statute, it is void. In *U. S. v. Goldsteins' Sureties*, 1 Dillon, C. C., 413, where the U. S. commissioner had fixed the bonds of defendant, in two cases, one at \$500 and the other at \$200, to appear and answer at the next term, and but one bond of \$700 was taken, the defendant not appearing, in an action upon the bond against the sureties, the Court held (Dillon Judge):—"Bonds or recognizances of this character are binding only where taken in pursuance of law and the order of a competent court or officer. No order was made authorizing a single bond for \$700, and the bond taken was a substantial departure from the bonds required by the commissioner, and was

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not therefore obligatory on the sureties." (1 Dillon, C. C., 413.) In which Justice Miller concurs.

Same doctrine is held, *State v. Buffum*, also in the *People v. Cabannes*, 20 Cal., where the magistrate had taken a bond different in its condition from that required by statute. The Court held: "In taking the bond the justice has exacted a security which the statute does not require, and such being the case we are of the opinion that no liability resulted from its execution." This seems to be the settled doctrine in all criminal cases—they are held by the court not to be voluntary bonds—and where not allowed by the statute they are void. And it seems to be now the settled doctrine of the United States courts in all cases of bonds extorted *colore officii* to declare them illegal and void.

This question was squarely raised in *United States v. Tingey*, 5 Pet., 115, where an officer of the government had required of one Dehlois as purser, a bond different in its conditions from that prescribed by statute and obliged him to give such bond as a condition to his holding such office and receiving the emoluments. In an action upon the bond against the surety Tingey, the Court, Story J., held: "It was plainly then, an illegal bond; for no officer of government has a right, by the color of his office, to require from a subordinate officer as a condition of holding office that he should execute a bond with a condition different from that prescribed by law—that would be, not to execute but to supersede the requisitions of law." (5 Pet., 115; 9 Curtis, 248–50.)

This case was determined upon this point alone, the plaintiff having demurred to the plea in the court below, and judgment having gone for the surety in the court below, the court above affirmed the judgment. This case is cited and approved: (10 Pet., 343; 12 Pet., 657; 15 Pet., 290; 7 How., 573; 12 How., 98; 10 Wall., 395.)

There is no contrary doctrine found in the cases, except in 5 Mass., 317, where a replevin bond by the plaintiff was required by the officer and given, conditioned to be void if the plaintiff recovered judgment, else of full force and effect,

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varying from the ordinary condition provided by statute. The Court hold in that case it was a voluntary bond, and they say it was not more oppressive in its conditions than the bond provided by the statute.

In many respects the case is to be distinguished from the one at bar. It did not appear in that case that the obligors made any objections; it did not appear that either of them knew at the time but that it was the proper bond; it does not appear that the officer made such a bond a condition precedent to taking the property. And the Court, upon what is stated in the pleadings might well hold that it is a voluntary bond.

The liabilities of sureties are *strictissimi juris*. Cooley on taxation, says: "In general the liabilities of sureties on these official bonds are the same as those on other undertakings of third persons. The undertaking of a surety is always looked upon as *strictissimi juris*, and cannot be extended beyond the exact terms of his undertaking. His position is essentially different from that of the officer himself. The latter in accepting the position has the obligation imposed upon him by law to perform its duties, but the former has only entered into a contract and consented to be bound by the terms of that, but by nothing else. The law creates for him no obligation whatever." (Cooley on Taxation, 502.)

The defendants have, by their obligation, undertaken that: "If R. J. Simonsen shall well and faithfully and impartially perform the duties and execute the office of *probate judge* of said county of Clay during his term in said office by virtue of his said election as aforesaid, without fraud, deceit, or oppression, then the above obligation to be void."

Now, if the defendant Simonsen has well, faithfully and impartially performed the duties and executed the office of probate judge without fraud, deceit, or oppression, the condition of the bond is not broken, and the action must fail. What are the duties of probate judge? They are specified in the Probate Act of 1864-5, then in force; and by section 23, Act 1862, page 258. It is contended by plaintiff's counsel that the office of probate judge and county treasurer are but one



office; that the provision of section 25, 1862, making the probate judge county treasurer *ex-officio* is but an enlargement of the duties of his office—without creating a new office—and that a bond executed for the faithful and impartial performance of the duties and to execute the office of probate judge, is a bond to also perform faithfully and impartially the duties and execute the office of treasurer.

The defendants contend that the office of probate judge and county treasurer though allowed to be filled by the same person are as much distinct and separate offices, and the duties of each as separate and distinct, as though filled by different persons. His duties are judicial; they are well and clearly defined, and though our Organic act is silent as to the powers and jurisdiction of the probate court, yet so well settled and so well understood are the rules and principles of law governing and controlling these courts that Congress in framing our Organic act and conferring upon the various courts their several jurisdictions, dismissed the probate court with the simple requirement that its jurisdiction "shall be limited by law," and in the well considered case of *Ferris v. Higley*, 20 Wallace, 375, where the Legislature of Utah undertook to enlarge the powers and duties of this court by giving to it chancery and common law jurisdiction, the Supreme Court of the United States say, (after quoting that part of our Organic act conferring jurisdiction upon the probate court, that "it shall be limited by law,") as to what part of the judicial power is vested in this court by the Organic act: "The answer to this must be sought in the general nature and jurisdiction of such courts as they are known in the history of the English law and in the jurisprudence of this country. It is a tempting subject to trace the history of the probate of wills and the administration of the personal estates of decedents from the time that it was held to be a matter of exclusive ecclesiastical prerogative down to the present. It is sufficient to say that through it all to the present hour it has been the almost uniform rule among the people who make the common law of England the basis of their judicial system, to have a distinct tribunal for the establishment of wills and the administration

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of the estates of men dying either with or without wills." (20 Wall., 382.)

And the case holds that this Organic court of ours, so briefly defined, is yet so clearly and carefully limited in its jurisdiction, that the Legislature of a Territory cannot impose upon it a single additional power or duty not known and recognized in the line of decisions of the common law. What then are the duties, and what is it to execute the office of probate judge, which the defendants have undertaken that Simonsen shall do faithfully and impartially without fraud, deceit, or oppression?

This office is a judicial one. Section 23, chapter 23, laws of 1862, requires the "probate judge to keep a record of all orders, decrees and other official acts, made or done by him, which record shall be opened to the inspection of all persons without charge."

This explains what the Legislature that created the office, regarded as official acts of the probate judge, and the probate record kept by these judges will explain what the judges have understood to be their official acts which they are obliged by law to record. Did this plaintiff go to the probate record to find the official acts of Simonsen as county treasurer? The records of the offices of probate judge and county treasurer are as distinct as the offices themselves; and anyone—the most ignorant—would as quick think of examining the sexton's record for births or marriages as of examining the probate record for the official acts of county treasurer.

Section 25 of said Act of 1862, by which the probate judge is made *ex-officio* treasurer, is peculiar in its language. It does not say that the probate judge shall perform the duties of county treasurer, but it says: "The several judges of probate shall be county treasurers *ex-officio*." It says in effect that one man shall hold the two offices; that by virtue of being elected probate judge, he is elected county treasurer.

The statute creating the offices, describes them as separate offices, and the same distinction is kept up with scarcely a variation throughout the statutes. Plaintiff claims the offices were made separate for the first time in 1874-5. Were they?

The law of 1874-5, which covers the whole subject of county officers and is substantially the law now in force, after naming the office of probate judge and prescribing the manner of his qualification prescribes his duties as follows: Section 76—"That the judge of probate of each and every county in this Territory shall perform all and singular the acts and duties which now are or which may be hereafter prescribed by law for judges of probate to perform." (Laws of 1874-5, page 57, § 76.) And after naming the county treasurer, and prescribing the manner of his qualification, his duties are prescribed as follows: Section 82—"That the county treasurer of each county in this Territory shall perform all and singular the acts and duties which now are or which may be hereafter prescribed by law for county treasurers to perform."

These sections clearly indicate that the Legislature understood the offices of county treasurer and probate judge to have been separate and distinct, and the duties of the one to have been different from the duties of the other; for, if the theory of this plaintiff be correct, that by the Act of 1862, the duties of the probate judge were simply enlarged, and that it was not a new office with new duties imposed upon him, then, when the Legislature of 1874-5 enacted that the probate judge "shall perform all and singular the acts and duties which now are prescribed by law for judges of probate to perform," it enacted that he should still perform the duties and acts of county treasurer. And when it enacted that the county treasurer shall perform all and singular the acts and duties which now are prescribed by law for the county treasurer to perform, it enacted that he should perform *no acts or duties*; for, by the theory of plaintiff, there are no acts and duties for the treasurer to perform. They are the duties of the probate judge. So that the office of probate judge and treasurer are still one, if plaintiff's view of these offices is correct.

The amount of the bond required of the probate judge would not seem to indicate that it was to cover his duties as treasurer. It is a responsible position. Large estates were liable to be subject to his official action, and if any bond at all was required, \$4,000 would not seem large where suit

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might be brought thereon for non-feasance or misfeasance in office by an aggrieved party. In the neighboring state of Nebraska, they have fixed the judge of probate's bond at not less than \$5,000, which may be increased to \$10,000. Other States vary in the amount of probate judges' bonds. In Minnesota it is but \$1,000, while in some, no bond at all is required.

In California, under a statute similar to ours, making the sheriff *ex-officio* tax collector, where the bond was executed for the faithful discharge of his duties as sheriff, and the breach assigned consisted in his failure to pay over moneys collected by him as taxes in his *ex-officio* capacity of collector, Judge Field says: "The offices of sheriff and tax collector are as distinct as though filled by different persons. The duties and obligations of the one are entirely independent of the duties and obligations of the other. The case of *Merrill v. Gorham*, 6 Cal., 41, only decides that there is no constitutional inhibition to the exercise of the two offices by the same person. The offices are not so blended that the bond executed for the faithful performance of the duties appertaining to the one would embrace, in the absence of the statute, the obligations belonging to the other. The duties of sheriff, as such, relate to the execution of the orders, judgments and process of the courts; the preservation of the peace; the arrest and detention of persons charged with the commission of a public offense; the service of papers in actions and the like; they are more or less directly connected with the administration of justice; they have no relation to the collection of revenue." (9 Cal., 292.)

The case while determining that the offices are separate and distinct, turned upon the construction of the Revenue act, which provided that the sheriff should be liable on his bond for the discharge of his duties in the collection of taxes.

The doctrine of this case is followed and approved in the *People v. Love*, 25 Cal., 521, 528, and again in *Lathrop v. Britain*, 30 Cal., 680, under the same law where the sheriff was allowed a deputy, but there was no provision for a deputy tax collector.

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This case (*People v. Love*) strikes the question of two offices squarely, and was the only question to be determined; and it follows the line of decisions already made, and settles the question, that though the offices are held by one person, they are yet separate and distinct offices.

Plaintiff below insisted that the California decisions were based upon their Constitution, and that but for the provision of their Constitution, the Court would have come to a different conclusion. Judge Field, in *People v. Edwards*, determines the question that they are distinct offices upon the nature of the offices without any reference to the Constitution; saying only: "The case of *Merrill v. Gorham*, 6 Cal., 41, only decides that there is no Constitutional inhibition to the exercise of the two offices by the same person." (9 Cal., 292.)

And the Court, in *Lathrop v. Britain*, 30 Cal., 683, after quoting the sections of the Constitution and referring to this objection, says: "The mode provided for the election of tax collector is an attempt to comply with the Constitutional requirement to the effect that the tax collector shall be elected by the electors immediately concerned."

And admitting the force of previous decisions that there was no Constitutional inhibition to the same person holding the two offices, it will be observed that all there is of the Constitution of the State of California as set out in *Lathrop v. Britain*, 30 Cal., 683, upon this question, is the provision requiring the sheriffs and tax collectors, &c., to be elected by the qualified electors, etc.

In 38 California, 76, *People v. Ross*, the question of the two offices of sheriff and collector came before the Court upon the sheriff's bond, sued upon for a breach as tax collector. And the Court here decide that he is not liable. The Court says:—"In the absence of any statute expressly providing that one official bond only shall be required of a person who holds both offices, and that such bond shall be for the faithful performance of the duties of both offices; a separate bond for each is as much required as if they were held by different persons."

This is the conclusion of California in a line of cases more

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similar to the one at bar than can generally be found upon the argument of a legal proposition. They are almost conclusive of the main question here involved, to-wit: Are, or were, the offices of treasurer and probate judge, two or one office? The question was raised in Ohio, *State v. Medary*, 17 Ohio, 554, where the board of public works consisting of five members, were permitted to select from the board a number of "acting commissioners" who were entrusted with the funds, their disbursement, &c. The acting commissioners only were each required to give bond for the faithful discharge of the duties of his office. One of these acting commissioners gave bond for the faithful discharge of the duties of a member of the board of public works, upon which suit was brought, alleging as a breach, failure to account for moneys that came to his hands as acting commissioner. The Court held that there were in effect, two offices; that the duties of each were distinct, notwithstanding the fact that no one could be an acting commissioner who was not a member of the board. And a bond given for the performance of a part of the duties of an office could not be construed to extend to all the duties that might be imposed.

In the *State v. Johnson*, 55 Mo., 80, the School law provides: "That the county treasurer in each county shall be the treasurer of all funds for school purposes belonging to the different townships, arising from whatever source." It also provided that he should give a separate bond conditioned for the faithful disbursement of these moneys. The Court holds upon a suit upon the general bond of the treasurer, no separate bond having been given, that they are separate offices.

But if, as was argued by plaintiff below, the fact that a separate bond was required had much to do with determining that case, we submit that it was only evidence of the Legislative intention, like any other fact, going to show that the Legislature intended them to be separate offices, though filled by the same person. And when our Legislature in 1868-9, page 303, §§ 101 and 102, provided that "whenever in the opinion of the county commissioners, more money shall have passed, or is about to pass into the hands of said treasurer

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than is or would be recovered by the penalty in the previous bond," they are authorized to demand and receive from him an additional bond in such sum as they, or a majority of them may direct.

Did it mean that the *probate judge* might be required to give a bond of \$8,000? or, did it not by implication, if not in direct terms, say that the treasurer under the circumstances therein named could be required to give a bond additional to this official bond as treasurer?

Does not this section like all the previous statutes upon this subject imply that a separate bond is to be given by the treasurer? What does this provision mean, if not this: that the treasurer shall give a separate bond, and an additional bond when required by the county commissioners under the statute? Plaintiff will hardly insist that it means an additional bond can be required of the probate judge—that treasurer means probate judge, and that whenever the statute reads "treasurer" it should read "probate judge." By arriving at such a conclusion our tax deeds would be as good signed by the probate judge as by the treasurer, and our deputy treasurer would be our deputy probate judge, and other results as ridiculous and absurd would follow from such interpretation of the statutes. It is and must be conceded that each case stands and must stand upon its own foundation, and the sureties are to be held by the terms of the bond, or not at all. As said by the Court in 17 Ohio, 565, *State v. Medary, et. al.*:

"The bond speaks for itself; and the law is that it shall so speak; and that the liability of sureties is limited to the exact letter of the bond. Sureties stand upon the words of the bond, and if the words will not make them liable, nothing can. There is no construction, no equity against sureties. If the bond cannot have effect according to its exact words the law does not authorize the Court to give it effect in some other way in order that it may prevail. It is not like a grant where everything is construed most strongly against the grantor, and where the intent governs and will be sought after from the object or extrinsic facts, to give such construction to words as to carry into effect the intention of the parties." (17 Ohio, 565.) The same doctrine is laid down in the late case of *People v. Pennock*, 60 N. Y., 421-26.

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There is no doctrine contrary to that laid down in the cases cited, that I have been able to discover. The Court in Nebraska (1 Neb., 182,) it would seem, on a first reading of the case, came to a different conclusion; but on a careful study of that case, I think it clearly appears that the Court determine the case upon another point.

It was a case of *quo warranto* against the county clerk acting as district court clerk without giving additional bond; and the Court while discussing the question of two offices really determine the case upon the ground that it did not appear that the county clerk had ever refused to qualify or give the bond as District Court clerk. That such a statute was directory only in any event, and if such a bond was required, a mere failure to give it, would not disqualify. There must be a refusal before he could be deprived of his office. In which conclusion Judge Mason concurs, but does not agree with their reasoning upon the other question. The defendants therefore submit that no breach of the bond has been assigned; that the principal, Simonsen, has done all that he, by the terms of his bond and his sureties by their contract, undertook that he would do. That neither by the terms of the bond nor the statutes then in force, can they be liable for any other than the acts of the principal as probate judge in the discharge of the duties of that office; that if such bond would otherwise have any force or effect in law, the illegal acts of this plaintiff by their acts of extortion and oppression under color of office, have annulled and canceled the obligations of these defendants; and that plaintiff's demurrer must be overruled.

*Alex. Hughes*, for appellee.

The bond is sufficiently sealed. (Civil Code, p. 151; Laws of 1862, p. 273.) Defendants state in the bond that it is signed and *sealed* by them, and they are now estopped from denying it. (54 N. Y., 40; 50 Howard, [N. Y.] 390; 5 Johns. Ch. 288; 28 N. Y., 323.)

It is well settled that the several persons who execute a sealed instrument, may use or adopt the same seal. (54 N. Y., 41; 9 Johns. 285; 10 Baily, 383; 27 N. Y., 564; 4 Wis., 96.)



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The defendants are estopped from denying the validity of the bond. It was executed by them voluntarily, their principal had the full benefit of it as a legal bond; he obtained possession of the office, money, books, etc., by reason of this bond, and they cannot now claim that it is illegal. (5 Mass., 317; 1 Dillon, 295 note.)

It is no defense to an action on an official bond that the principal did not take the oath of office and qualify, as required by law. (*State v. Findley*, 10 Ohio, 51; *People v. John*, 22 Mich., 461.) It is too late to raise the question as to the validity of an official oath after the state has consented to waive the objection, and after the principal has enjoyed the benefits of the office. (8 Wend., 483; 2 Pick., 581; 10 Ohio, 51; 5 Mass., 317; 3 Conn., 192.)

There was no such office as county treasurer at the time the defendants executed the bond sued on in this case, separate and distinct from that of judge of probate. They were not separate and distinct offices. Laws of 1862, page 254, provides that "each organized county shall have the following described officers, to-wit: three county commissioners, a register of deeds, sheriff, judge of probate, coroner, justices of the peace, constables, county surveyor and district attorney." The office of county treasurer, as a separate office, was not created by this act, but it is expressly provided in section 25 of this act that the several judges of probate in this territory shall be county treasurers *ex officio*, and shall perform all the duties of that office.

The Legislature in 1872 recognized but one office. It is provided in chapter 33 that when the assessment in any county exceeds \$20,000, the *judge of probate* shall be paid a salary of \$600. Had the Legislature created these offices separate and distinct, and provided that the judge of probate should perform the duties of each, the case would be different. (1 Neb., 182; 21 Ohio St., 1; 16 Ohio St., 35.)

**CONSTRUCTION OF BOND.** The bond is to be construed according to the intent of the parties, and in doing this, the court should take into consideration the circumstances under which and the purposes for which it was given, and the obligees

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must have known the purpose, etc. Did not defendant know that the object of this bond for \$8,000 was to cover duties in his capacity as *ex officio* county treasurer? (23 Iowa, 24.)

A statute requiring a bond, but silent as to the conditions thereof, the conditions are to be found in the object and intention of the statute. (7 Fla., 13.) The whole language of the conditions of a bond is to be taken into consideration in ascertaining its true construction. (10 N. Y., 210; 7 Peters, 122; 10 *ibid*, 493; 3 Cranch, 229.) The liability of a surety on an official bond is not to be extended beyond the fair scope of its terms. (9 Wheaton, 238.) In bonds given to secure the public, courts will disregard objections purely technical. (8 Iowa, 553.)

In giving the construction to a bond, the court will take into view all the surrounding circumstances, and especially the objects for which the bond was given, and lean to such construction as would make it efficient to accomplish that object; (23 N. Y., 198) and when the intention of the parties is manifest, will suppress insensible words, and supply accidental omissions, in order to give effect to that intention. (8 Ala., 466; 6 Iredell, N. E., 57; 9 *ibid*, 250; 1 Hawks, 20.)

On question of color of office, and legality of bond: (*Webber v. Blunt*, 19 Wend., 191; *Acker v. Burrall*, 21 Wend., 607; 23 Wend., 607; *Morse v. Hodson*, 5 Mass., 316; *United States v. Hodson*, 10 Wal., 395.) What is meant by constraint: (*United States v. Bradley*, 10 Peters, 343.)

The bond is good as a common law obligation, independent of the statute. (2 Gray, 53, and cases cited; 10 Ohio, 59; 28 N. Y., 322; 1 Dillon Mun. Corp., § 155, notes and cases cited; 10 Wal., 408; Civil Code, p. 367, chap. 3.

Defendant Simonsen has failed to comply with the conditions of the bond, in this:

1. He has not delivered to his successor in office the public funds, books and papers, which he received by virtue of his office.

2. He has not settled with the county commissioners as required by law.

3. He either burned or permitted to burn by his own fault the books and records which he received by virtue of his office.

A collector of taxes, by accepting the office, takes the risk of the safe-keeping of the money he has actually received. He is an accountant, a debtor, bound to account for and pay over the money he has collected. The loss of the money, by theft or otherwise, is no excuse for non-performance. This is founded on the nature of his contract, and on grounds of public policy. (12 Cush., 112; 6 Ohio St., 607; 12 Ohio St., 59; 1 Denio, 233; 3 Barr, 372; 3 Penn. St., 373; 18 American, 41; 20 American, 637; 25 N. Y., 274; 12 *ibid*, 104; 14 American, 62; 22 Ind., 125; 28 *ibid*, 86; 1 Dil. Munic. Cor., 296; 3 How., [U. S.] 578; 13 Wal., 17 and 57; 37 Iowa, 550.) As to what will excuse the performance of a contract: (25 N. Y., 274; 12 *ibid* 107; 14 American, 62; Civil Code, page 364, ch. 3.)

The commissioners were authorized to institute this suit, independent of the statute. (26 N.Y., 516.)

Powers and duties of board of county commissioners: (Laws of 1868-9, p. 171, § 16, p. 302, § 101; 1 Dillon, Munic. Corp., 275, n. 1.)

On matter of defense that the county failed and refused to furnish a safe in which to keep the records and funds pertaining to the office of treasurer: (*Halbert v. The State*, 22 Ind., 125.)

No demand upon Simonsen was necessary before commencing suit. It was his duty to pay over all money in his hands, and deliver all books and papers pertaining to his office to his successor, which was not done. When an officer is required to do this by law, and fails, there is a breach without demand. (27 Wis., 506; 2 Gray, 53.)

BENNETT, J.—The parties in their pleadings do not differ materially in their statement of the facts in this case, and they have presented them in such a way as to have the question of defendants' liability determined on demurrer.

It is not my purpose to notice all the points made in the briefs of counsel, or in the order in which they are furnished, but only such as I deem essential to the determination of the

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case. And I shall first notice the objections to the paper purporting to be the official bond of Simonsen, and on which suit is brought. It is insisted that it is not a voluntary bond, not such as he could legally be required to execute, for the reason that the penalty (\$8,000) is in excess of the statutory requirement, and was extorted under color of office. The first statute enacted in this Territory, relating to the qualification and duties of the judge of probate, was passed at the first session of the Legislative Assembly, and approved April 24, 1862. Section 22 of that act reads as follows: "The judge of probate shall, before he enters upon the duties of his office, execute a bond to the board of county commissioners of his county in the penal sum of four thousand dollars," etc. At the date of the execution of the bond in suit, this was the only statute in existence relating in terms to the bond of the judge of probate, and if defendants' objection rested solely on this provision, its solution would be freed from many of the perplexing questions that now environ it; but this officer being charged with the performance of other important official duties, by virtue of his office as judge of probate, makes it impossible to properly construe this provision standing alone, but makes the examination of other statutes necessary in order to determine its true intent, scope and purpose. It is an important fact to be borne in mind, that in the act referred to, entitled "An act to provide for county officers," no such an officer as that of county treasurer is named among the officers which all organized counties should have, but section 25 provides that "the several judges of probate shall be county treasurers *ex-officio*, and shall perform all the duties of that office," etc. And the "act prescribing the manner of conducting elections," etc., passed by the same General Assembly, after fixing the day on which the general election should be held, provides for the election of the following officers: "that is to say, a Delegate to Congress and other Territorial officers, \* \* judge of probate, district attorney," &c., but makes no mention of county treasurer.

It must further be borne in mind that at the date of the execution of said bond there was no provision of statute requiring the judge of probate, as such officer, to give any other or

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additional bond for the faithful discharge of his duties as county treasurer; and yet we find in the act relating to revenue, passed at the same session, frequent reference to the county treasurer, and his liability on his official bond. What bond can be meant? Counsel for defendants say no bond, as the treasurer was not required by law to give a bond. If that be so, then all reference to the treasurer's bond in the Revenue act must be meaningless. Such a conclusion cannot be reached without the most cogent reasons, and after all effort to construe the language, according to the rules of reasonable construction, so as to give it force and effect, has failed. What was the evident intention of the Legislature in requiring a bond from the judge of probate?

After a careful examination of all the statutes passed at that same session relating to matters properly cognizable in a probate court, I fail to find a solitary provision making the judge of that court responsible for any money or property, or any mention of his liability on his official bond. Turning again to section 25, chapter 23, laws of 1862, we find the following provision: "They," the several judges of probate, in their capacity as county treasurers *ex-officio*, "shall report the amount of county funds in their hands to the board of county commissioners of their respective counties at their annual meeting, on the first Monday in June of each year, and as often thereafter as demanded by them, and disburse the same subject to their order."

Now can it be contended with any show of reason that the Legislature intended that the bond provided for in section 22, same act, should cover only acts of malfeasance or misfeasance in his office as judge of the probate court, and leave the public revenue coming into his hands as county treasurer wholly unsecured. He was made *ex-officio* county treasurer—that is, by virtue of his office as judge of probate, by virtue of his election to that office alone, was he authorized and empowered to perform these additional duties and receive therefor the emoluments provided by law. There was no provision for a separate qualification or the execution of a separate bond. When he had qualified as judge of probate, and exe-

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cuted the bond required, all the duties, responsibilities and emoluments attaching to that office, under the provisions of the statutes, and clearly contemplated by his election, came within the purposes of that qualification, and were covered by the conditions of the bond, unless otherwise specially provided, as in the case of the bond of a justice of the peace, the duties of which office the judge of probate also discharged *ex-officio*.

Throughout years of subsequent legislation, and until the Act of January 15th, 1875, the provisions of said sections 23 and 25 remained unchanged (with but one exception which I shall presently refer to) and in full force. This subsequent legislation included several acts relating to the revenue, covering the acts and responsibilities of the county treasurer, with numerous allusions to his official bond.

I am clear in the opinion, that under the law as it then stood, when the bond in this suit was executed, the judge of probate was required to execute but one bond, and according to the rules of reasonable construction, and the intent of the Legislature gathered from the wording of the statute and all kindred enactments, that bond covered his duties as county treasurer, and on it he and his sureties must be held liable for any violation by him of the provisions of the Revenue law. I think but little light would be thrown on this question by an examination of the authorities cited, as the decision of most of the cases to which the attention of this court has been called, turned upon the peculiar phraseology of the statutes which the courts were called upon to construe.

This prepares us for an inquiry into the objection that the penalty of the bond in suit, is in excess of the statutory requirement.

And here again I must ask to be excused from following counsel through all the enchanting labyrinths of legal lore, which they in their able arguments have explored, as I think there is no difficulty whatever in finding a solution of the question in the statute. As above stated the statutes of 1862, providing for the bond of the judge of probate remained unchanged, with one exception, until the Act of January 15, 1875.

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In the Revenue act approved January 12th, 1869, we find the following provision, being section 101: "The county commissioners of any one of the counties of this Territory may require the county treasurer to give additional freehold sureties, whenever in the opinion of a majority of said commissioners the existing security shall have become insufficient; and said commissioners are hereby also authorized and empowered to demand and receive from said county treasurer an additional bond, as required by law, in such sum as said commissioners, or a majority of them may direct, whenever in their opinion more money shall have passed, or is about to pass, into the hands of said treasurer than is or would be recovered by the penalty in the previous bond." Here we have the phrases, "additional freehold sureties," "an additional bond," "the previous bond," &c. Additional, must presuppose something to which an addition can be made. "Additional sureties," "additional bond as required by law," and "previous bond" must refer to some bond executed in compliance with the provisions of some statute; and when we come to search for that statute, we find it is the same section 22 of chapter 23, laws of 1862, in which the penalty is fixed at four thousand dollars, a recognition by this General Assembly of the fact that the bond required to be given by the judge of probate covered his duties as county treasurer.

Now that being the bond, the board of county commissioners is authorized and empowered to require an additional bond in such sum as they may direct. And here it may be claimed that this can only be required after the original bond has been executed. But this, I think, would be a very narrow construction. The law does not require vain things, and it would be worse than folly to hold that the treasurer must first execute a bond in the penal sum of four thousand dollars, enter upon the discharge of the duties of his office, become possessed of money and property in value, it may be ten times in excess of the penalty in the bond, before he can be called upon to give the additional security provided for the protection of the very same funds and property which he already holds and controls. Such a construction might defeat the very object and purpose of this enactment.

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It is in the discretion of the board of county commissioners to demand this additional bond, or, which we hold equivalent, an increase in the amount of the penalty, whenever in their opinion more money shall have passed, *or is about to pass*, into the hands of said treasurer than is or would be recovered by the penalty in the previous bond. If an additional bond may be required after the treasurer has executed one, and entered upon the discharge of the duties of his office, *a fortiori*, may it be done before he qualifies, if in the opinion of the board the sum originally fixed, to-wit: \$4,000 is insufficient to cover his probable liability. It may be required before the money passes; when it is about to pass.

I find in this provision ample authority given the board to increase the penalty in the treasurer's bond, or, to speak more accurately, the bond of the judge of probate, in view of his increased liability as *ex officio* county treasurer, over and above \$4,000.00, and it matters not, in contemplation of this statute, whether the security furnished the county is in one, two or three separate instruments, so that the board does not abuse its discretion, and require an unreasonable bond, of which there is no complaint in this case.

This view of the case disposes of the point that the bond was not a voluntary bond, but extorted under color of office.

The rule is well settled that upon the argument of a demurrer to the answer, the defendant may attack the complaint upon the grounds that the court has no jurisdiction, or that the complaint does not state facts sufficient to constitute a cause of action, and if it appears that the objections thus raised are well taken, the defendant will be entitled to judgment, notwithstanding the defects in the answer. (2 Wait's Practice, 466, and authorities cited.)

Under this rule, counsel for defendants have urged various objections to the complaint, the first of which is that there is no breach of the bond sufficiently alleged. The allegation in the complaint is as follows:

"That thereafter, to-wit: on or about the 22d day of January, 1875, defendant R. J. Simonsen resigned his said office to the board of county commissioners of said county, who



thereupon appointed as his successor in said office, William Shriner; that said William Shriner has long since filed his bond, properly approved as the law directs, and entered upon the discharge of the duties of said office, but that said R. J. Simonsen has failed and refused, and still fails and refuses to account for said money, books, records, papers and documents, or any part thereof, or to deliver the same to his successor in office, or to any other person or persons authorized by law to receive the same."

The law in force at the time of the alleged breach (§ 36, ch. 4, laws 1868-9) required the county treasurer to render his account to, and settle with, the county commissioners, at the time required by law, and pay into the county treasury any balance which may be due the county. The commissioners might require the treasurer to settle with them at any time, but he was absolutely required to make full and complete settlements at three particularly designated times; these were on the first Mondays of May and October of each year, (§ 80, ch. 25, laws 1868-9) and a final one on going out of office, when it is made his duty to deliver to his successor in office all public moneys, books, accounts, papers and documents in his possession. (§ 98, *ibid.*)

What it might have been necessary for the commissioners to have done, and the complaint to have stated, different, had this case originated in one of the semi-annual settlements, or one made or refused on demand of the board, or whether the requirements of the statutes are the same in all cases, it is unnecessary here to discuss. This case is one where the treasurer, *on going out of office*, has failed and refused to settle and account.

There are three acts of omission on the part of the treasurer, specifically mentioned in the statute, (§ 99, *ibid.*) which constitute a breach of his official bond, for any one of which upon its occurrence, suit may be brought. These are: 1, If he shall fail to make return; 2, Fail to make settlement; or, 3, Fail to pay over all money with which he may stand charged, at the time and in the manner prescribed by law.

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The pleadings in this case disclose the fact that defendant Simonsen has wholly failed and neglected to comply with any one of these requirements; he has failed to make return; he has failed to make settlement, and he has failed to pay over all the money with which he stands charged, at the time and in the manner prescribed by law. How do defendants seek to avoid this? 1. On the ground, as alleged, that the board of county commissioners had not adjusted Simonsen's accounts as required by statute, and 2, on the ground that there is no allegation in the complaint of any demand upon the treasurer to report the funds in his hands.

Section 37, chapter 4, laws 1868-9 provides that "if any person thus chargeable, shall neglect or refuse to render true accounts, or settle as aforesaid, the county commissioners shall adjust the accounts of such delinquent, according to the best information they can obtain, and ascertain the balance due the county, and order suit to be brought in the name of the county therefor." This provision makes it the imperative duty of the board to ascertain the balance due the county and order suit brought. How are they to ascertain the balance due, when the person chargeable neglects or refuses to render true accounts? "*According to the best information they can obtain.*" Can it be claimed that that information, the source from which it was obtained, the basis on which the computation or calculation was made, with copies of all record entries, papers, vouchers, &c., if any, used or examined by the board in adjusting the accounts, should be alleged and set out in the complaint? Certainly not. The words, "facts constituting a cause of action," as used in our Code of Civil Procedure, mean those facts which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of the facts. Every fact which the plaintiff must prove, to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred and set forth according to their legal effect and operation, and not the evidence of those facts, nor arguments, nor inferences, nor matters of law only. It is error to assume that there can be no breach on part of the treasurer

of his official bond, without assistance from the board of county commissioners; it doubtless takes two parties to make a contract, but it requires only one to break it; and section 37, *supra*, clearly contemplates that the conditions of the bond have already been broken, and directs the commissioners how to proceed—not in the interest of the treasurer, but for the protection of the rights of the public; not for the purpose of perfecting the breach, but to enforce the penalty. As before stated, this action does not originate in one of the semi-annual settlements, or on demand of the board at a time not fixed by statute, but *upon the treasurer going out of office*, and having failed to make return, failed to make settlement, and failed to pay over the funds with which he stands charged, and to the custody and control of which he no longer has any possible right, he cannot be permitted to treat the matter with such cool indifference, and say to the board: examine my returns, when he has made none; adjust my accounts, when he has rendered none; count the money due from me to the county, when he has failed to produce it. The object of the statute in directing an adjustment by the board, is that they may be able as far as possible to ascertain the balance due, to enable suit to be brought, and that the proper allegation of liability may be made in the complaint; and it is unnecessary for the complaint to contain any allegation of adjustment by the board, it will be presumed that the board took the necessary steps to ascertain the material facts before ordering suit brought, and that could be the only object contemplated. Any adjustment made by the board would not be conclusive, and if suit were brought for more than the amount due it could not prejudice the rights of either party.

The second point, that there is no allegation in the complaint of any demand upon the treasurer to report the funds in his hands, is not well taken. Upon going out of office it is made his imperative duty to deliver to his successor in office all public moneys, books, accounts, papers, and documents in his possession. This presupposes a return made by him, an adjustment of his accounts, and settlement with the board. He should, at that time, exhibit to the board, without de-

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mand, for the obligation is one imposed by statute, the exact condition of the affairs of his office, and have then and there all the public funds, records, &c., pertaining to his office, and in his possession, ready to be turned over to his successor. A failure in this respect will constitute a breach of the conditions of his bond, and he cannot shield himself from liability by the childish plea, that no one demanded of him the performance of his sworn duty. (*Joint School Dist. No. 1. v. Lyford, et. al.*, 27 Wis., 506.) The policy of the law is to hold the financial agents of the government to the strictest accountability, and when their duty is plainly pointed out by statute, they must perform it, without demand or notification. The proposition that a public officer, in charge of public funds and property, on retiring from his office, either at the expiration of his term or on resignation, is under no obligation to settle and turn over such funds and property, except on demand, when the law clearly designates the body with whom he shall make settlement, and the person to whom he shall transfer, carries upon its face its own refutation, and I shall dismiss it without further comment.

We hold that the facts stated in the complaint are sufficient to constitute a cause of action; that the instrument sued on is a valid legal bond, substantially complying with the requirements of the statute, and covering the duties of judge of probate in his capacity as *ex-officio* county treasurer, and that for the breaches alleged, the principal and his sureties are liable, unless the matters pleaded in the answer are sufficient to constitute a defense.

The conditions of the bond are absolute, and provide that he "shall well and faithfully and impartially perform the duties and execute the office \* \* without fraud, deceit or oppression." These duties are defined by the provisions of the statute, and the performance of them is only well done, faithful and impartial, when in strict compliance with these provisions; and under these provisions and the obligations of his bond, he is bound, not to exercise due care and diligence in the discharge of his duty, but to perform it absolutely, without conditions or exceptions, unless the party can estab-

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lish facts that bring his excuse within the following provisions of our Civil Code (Sec. 855): "The want of performance of an obligation, or an offer to perform, in whole or in part, or any delay therein, is excused by the following causes, to the extent to which they operate: \* \* "2. When it is prevented or delayed by an irresistible super-human cause, or by the act of public enemies of this Territory or of the United States, unless the parties have expressly agreed to the contrary." I omit subdivision 1 and 3 of this section, as under the pleadings they can have no application to this case. Now, the only allegation in the answer that savors of an excuse for non-performance, is stated in the following words: "That on the said 13th day of January, 1875, the said building, and in it all the said money, books, records and documents, were utterly consumed and destroyed by fire, without any want of reasonable care and diligence on the part of said defendant Simonsen, in the care and preservation thereof, so that all the same were entirely lost to the said Simonsen and this plaintiff, and no part thereof has ever been recovered or restored." The liability of the treasurer, upon a bond of the character of the one in suit, being that of an insurer, and not measured by the law of bailments. (*Hancock v. Hazard*, 12 Cushing, 112; *Muzzy v. Shattick, et. al.*, 1 Denio, 233; *Commonwealth v. Conly*, 3 Penn. St., 372; *The State v. Harper*, 6 Ohio St., 607; *Pearly v. Muskegon Co.*, 32 Mich., 132; 1 Dillon Mu. Cor., 296.) The material inquiry now presented is, can destruction by fire come within the definition of "an irresistible super-human cause?" I understand these words to be equivalent to, and used in the same sense as "act of God," which Lord Mansfield says "is natural necessity, as wind and storms, which arise from natural causes, and is distinct from inevitable accident." Parsons (2 Contracts, 159,) defines the phrase to mean, "a cause which operates without any aid or interference from man. For if the cause of loss was wholly human, or became destructive by human agency and co-operation, then the loss is to be ascribed to man and not to God, and to the carriers negligence, because it would be dangerous to the community to permit him to make a defense which

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might so frequently be false and fraudulent." If this rule and reasoning can be applied to a common carrier, with how much more force may we include the public officer entrusted with the safe keeping and disbursement of public funds.

In Greenleaf on Evidence, (2 Vol., § 219,) the learned author, after giving Lord Mansfield's definition of the phrase, uses the following language: "Therefore if the loss happened by the wrongful act of a third person, *or by an accidental fire*, not caused by lightning, \* \* \* the carrier is liable." Citing *Hyde v. Trent & Mersey Nav. Co.*, 5 T. R., 387, and *Forward v. Pittard*, 1 T. R., 27. The same doctrine has been held in the case of *The Dist. Tp. of Union v. Smith*, 39 Iowa, 9.

Accidental fire, therefore, not caused by lightning, is not "an irresistible super-human cause," and will not excuse from the performance of an obligation unless specially so stipulated, or when the party is bound only to the exercise of reasonable care and diligence, (*Ross v. Hatch*, 5 Iowa, 149,) and no such facts appearing from the pleadings in this case, these points need not be noticed.

The case of *District Township of Taylor v. Morton*, 37 Iowa, 550, was an action brought against defendant on his official bond as the treasurer of plaintiff. The law required him to give bond "conditioned for the faithful performance of his duty," and the condition of his bond read, "if the said Morton, as treasurer, shall faithfully and impartially discharge the duties of said office as required by law," etc.

The allegation in relation to the loss of the property, was in similar language to the answer in this case, except it was there alleged that the money was stolen; here it was burned. Mr. Chief Justice Beck, in delivering the opinion of the Court, says:

"His liability rests on the conditions of his bond, and if by them he is required to do an act which, without his fault, becomes impossible on account of anything occurring subsequently to the contract, he will not be released. These rules are applicable to all contracts, and the public interests demand that, at this day, when public funds in such vast amounts are committed to the custody of such an immense

number of officers, they should not be relaxed when applied to official bonds. A denial of their application in such cases would serve as an invitation to delinquencies, which are already so frequent as to cause alarm."

This we deem settled law; and settled too on the highest considerations of public policy, as well as in strict justice to those who by their solemn obligations undertake to answer for the custody and safe keeping of public funds and property. It is the well recognized doctrine of the Supreme Court of the United States, as held in the following cases: *The United States v. Prescott*, 3 How., 578; *The Harriman*, 9 Wal., 161; *Boyden, v. United States*, 13 *ibid*, 17; *The United States v. Thomas*, 15 *ibid*, 337; see, also, *Harmony v. Bingham*, 12 N. Y., 99; *Tompkins v. Dudley*, 25 N. Y., 272; *The Dist. Tp. of Union v. Smith*, *supra*; *Fowler, et. al. v. Bott, et. al.*, 6 Mass., 63; *School Dist. No. 1. v. Dauchey*, 25 Conn., 530.

In commenting on the phraseology of the statute requiring the treasurer on going out of office to deliver to his successor in office all public moneys, books, &c., in his possession, much stress has been laid by counsel for defendant on the last three words, "*in his possession.*" And it has been insisted that the property having been destroyed by fire, is not in his possession, and therefore could not be turned over. Neither would it have been any more in his possession had it been stolen, or by him embezzled and transferred to the possession of a guilty confederate. The position is a very lame one. The law presumes the treasurer to have possession of all public funds and property that may have come into his hands by virtue of his office, and which he has not paid out or disposed of in some manner authorized and prescribed by statute. If he has not the funds or property in his possession, and cannot show that they have been applied and disposed of as directed by law, and can plead no legal excuse for the non-performance of his obligation, then he must answer on his bond. Any other rule would be dangerous to community, and open the door to all manner of villainy, by "encouraging defenses which would so frequently be false and fraudulent."

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The fact that plaintiff failed to furnish a safe on request of defendant Simonsen, is no excuse for the non-performance of his obligation. He became personally responsible, and in the absence of any statutory provision, must provide for the safe keeping of the funds and property coming into his hands, the same as a common carrier. (*Halbert, et. al. v. The State*, 22 Ind., 125.)

There is one other point made by counsel for appellants, which should have been noticed in its proper place. It is insisted that the words, "without fraud, deceit, or oppression," contained in the conditions of the bond, explain the preceding language, and are a limitation on defendant Simonsen's liability. This cannot be (admitting this to be words of limitation, which is not at all clear,) unless authorized to be inserted by the statute, which is not claimed in this case. A party assuming the duties and responsibilities of a public official trust, takes it with all the obligations and liabilities imposed by law, and cannot be permitted to engraft into his bond conditions foreign to the statutory provisions for the purpose of limiting the legal obligations imposed. If such language is used it will be treated as surplusage, and advantage cannot be taken of it for the purpose of avoiding legal liability.

Finding no error in the record, the judgment of the court below sustaining plaintiff's demurrer to the answer is affirmed and the cause remanded for such other and further proceedings as may be authorized by law.



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## DECEMBER TERM, 1877.

## PRESENT:

HON. PETER C. SHANNON, CHIEF JUSTICE.

HON. ALANSON H. BARNES,	}	ASSOCIATE JUSTICES.
HON. GRANVILLE G. BENNETT,		

## THE TERRITORY EX REL. MCKINNIS V. HAND.

1. **COUNTY OFFICERS: APPOINTEES: TERM OF OFFICE.** County officers appointed by the governor on the organization of a new county, hold until the next general election ensuing after such organization, in which their successors must be elected.
2. ———: ———: ———. If the next general election after such organization be not one at which county officers are chosen for a full term, the successors of such appointees must be chosen to fill the unoccupied term.
3. ———: ———: ———. The appointees hold until the next general election, and until their successors are elected and qualified; and in the absence of any statute fixing a positive time, the officer elect is entitled to the office and its emoluments as soon as the result of the election has been officially declared, and he has qualified as required by law.

*Appeal from Lawrence County District Court.*

THE facts are stated in the opinion.

*G. C. Moody and S. L. Spink* for appellant.

The record in this case discloses the fact that before the application for mandamus, the appellant, as county clerk, had performed the duty required of him by law, by making out and delivering to the sheriff the notices of the election, to be held on the 6th day of November, 1877, incorporating in such notices such offices as were in his judgment to be filled at such election, to-wit: the justices of the peace for the county,

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and one county commissioner, and the respondent sought by the application to compel him to amend his notices and issue new ones, incorporating therein the offices of register of deeds, sheriff, treasurer, judge of probate court, district attorney, coroner, superintendent of public schools, assessor, and the other two county commissioners.

This raises the question squarely, whether it was his duty to incorporate into such notices the names of the last above named offices, and thus the question is raised whether such named offices were to be filled at the election thereafter to be held on the 6th day of November, 1877.

On behalf of appellant, we claim that it was not his duty to name these offices in his notices, because they were not offices which by law were to be filled at the election in 1877, for the reasons: 1st, no vacancy was shown to exist; 2d, the power of appointment had been given to the governor, and had been exercised under the special act; said officers, so appointed, were to hold their offices until their successors should be elected and qualified according to law; and 3d, there was no law authorizing the election of such officers until the general election in the year 1878. (§ 15, p. 42 of the Revised Codes.)

This special enactment cannot, by any fair construction of it, when speaking of the election and qualification of the successors to these offices, be held to refer to any other enactment providing for special cases, but must be held to refer only to the general law upon that subject, to-wit: to the provisions of said section 15, referring to the officers of organized counties. This became an organized county at once, upon the appointment of these officers by the governor, and their qualifying.

No where in the statutes is there found any provision for the election, in organized counties, of such officers, save in said section 15, which provides for their election in 1878, and every two years thereafter.

Section 3 of said chapter 21, relating to counties and county officers and the organization of counties, (page 40, Revised Code), provides that county commissioners appointed upon the petition of fifty voters and upwards, may appoint county officers, and that such officers so appointed by such county

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commissioners should hold their offices until the next general election, and until their successors shall have been elected and qualified, but does not provide for such limitation of the term of officers appointed in any other way, or by any other tribunal or authority. And therefore it would be *legislation* and not *construction* to tack those special provisions relating to the counties in the Black Hills, when no reference whatever is made thereto.

But even under that law we do not concede that the officers thus appointed, if appointed previous to election in an odd year, would only hold until the election of that odd year; for such a construction would make the term of the officers then elected but one year, whereas the term of all such officers when elected, except county commissioners, is made two years by law.

Again, in support of the view we take, we call the Court's attention to sections 8, 11 and 12, pages 60 and 61 of the Revised Codes, in which it is provided that all vacancies in these disputed offices shall be filled by the board of county commissioners, and appointments to vacancies thus made shall continue until the next general election *at which the vacancy can be filled*. And persons thus appointed shall qualify in the time prescribed in their appointment, whereas by sections 9 and 10, pages 10 and 11 of the Revised Codes, officers elected are to qualify and enter upon the duties of their office on the first Monday of January next succeeding their election, or within ten days thereafter. And their terms commence on the first Monday of January next succeeding their election.

No where in the statutes can be found a provision limiting the terms of these officers, when filled by election, to less than two years. On the other hand by chapter 23, page 224, laws of 1862, the terms of these officers are expressly fixed at two years, and as to the term of such offices that chapter has never been repealed. But by the construction of this Black Hills enactment contended for by respondent, the terms of all these offices filled by election in 1877, would be, by implication merely, limited to one year. This, we repeat, if followed by the courts, would be legislation and not construction.

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As seemingly to enforce our view of the proper construction of this Black Hills enactment, we find an express exception in the case of justices of the peace, they being by the 8th section thereof, only to hold until the election in 1877. And if it was the intention of the Legislature that all the other officers should hold only until that time, why single out and expressly mention justices of the peace. Does not the rule here apply, "that the express mention of one class excludes the others." (Dwarris on Statutes, page 221.) Counsel also cited the following statutes, bearing generally on the points discussed: Ch. 40 § 3, Ch. 42 § 15, and Ch. 22, Political Code.

*McLaughlin & Steele*, for same.

This is an appeal from an order of Hon. Granville G. Bennett, judge of the District Court of the First Judicial District, in and for the county of Lawrence, ss., who issued on the — day of October, 1877, a peremptory mandamus to the defendant, commanding him to give notice of a general election for county offices in said Lawrence county, on the 6th day of November, 1877. The question involved and presented to his honor, and which he decided affirmatively, was: "Does the law of Dakota require an election for county officers at the election to be held on the 6th day of November next?"

From the order of the judge, an appeal was taken to this court.

We think there was error in the ruling of his honor, and that the same should be reversed, on technical grounds, as well as on the merits.

On strictly technical grounds, the alternative writ of mandamus issued and served upon the defendant, citing him to show cause why a peremptory writ should not issue, was not under the seal of the court, and therefore was a nullity. (*People v. Fisk*, 1 Hun.)

In this Territory we have "orders" and "writs." The former is defined by section 509, Code Civil Procedure, to be: "every direction of a court or judge, made or entered in writing, and not included in a judgment." Thus we have the "order of arrest," which is issued by the judge of the court in which the action is brought, (§150) and the "order of injunction," which is issued by the court or judge, (§ 188.)

The sections of the code referring to and regulating the remedy by mandamus, speak of it as the "writ," and "writ" it should be. (§ 695, 696, 697, and following sections to 706, inclusive.)

A writ is defined to be: "A mandatory precept, issued by the authority, and in the name of, the sovereign or state, for the purpose of compelling the defendant to do something therein mentioned. It is issued by a court or other competent jurisdiction, and is returnable to the same. It is to be *under the seal*, and is directed to the sheriff or other officer lawfully authorized to execute the same. (3 Blackstone, 273; 1 Qidd's Practice, 93; Gould's Pl. & Pr., ch. 2, § 1; 2 Bouvier's Dict., 680.)

It may be contended that § 8, p. 510, Code Civil Procedure, obviates the necessity of the writ being under seal, because it is there said that the word "writ" signifies an order \* \* in writing, issued in the name of \* \* a court or judicial officer. If it said, issued *by* a court or judicial officer, instead of "in the name of," disputation would end, and "writ" and "order" would be convertible, as well as synonymous, terms. It seems that the fair construction of this provision, is that the order or precept must be tested "in the name of the court or judicial officer," and does not dispense with the necessity of being under seal.

The writ of mandamus should not issue, where there is a plain, adequate remedy at law. So held in a large majority of reported cases. Special reference is made to the following: *People v. Sup. Chenango Co.*, 11 N. Y., 563; *People v. Hawkins*, 46 N. Y., 9.

The validity of an election in this territory does not and cannot be made to depend, under existing law, upon the publication of an election notice or call by the clerk. The privilege of voting is conferred by Congress, and certain qualifications are imposed on the voter by the Legislative Assembly. Those possessing the requisite qualifications are entitled to vote at any general election, and do not derive any political power or privilege from the act of the county clerk, in publishing an election notice, nor would they lose any by his omission to do so.

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*Bartlett Tripp and Gamble Bros.*, for appellee.

Cited and relied on the following authorities: *State v. Gamble*, 13 Fla., 9; *State v. Conrades*, 45 Mo., 45; *State of Oregon v. Johns*, 3 Oregon, 533; *Wolsen v. Cobb*, 2 Kansas, 32; *McAlfee v. Russell*, 29 Miss., 84; *Dwarris on Statutes*, 189; *Patterson v. Winn*, 11 Wheat., 385.

BENNETT, J.—The Territorial Legislature, by an Act approved February 10, 1877, provided for the organization of the counties of Lawrence, Pennington and Custer, and authorized the governor to appoint all the officers for said counties except justices of the peace. The Territory embraced within these counties, was, at the time of the passage of said act supposed to be within an Indian reservation, and the act provided that nothing should be done by the governor towards the organization of said counties until the Territory embraced within them should come within the jurisdiction of the Territory.

After the ratification of the Sioux Indian treaty by Congress on the 28th day of February, 1877, the governor appointed the officers for said counties, among others the appellant as register of deeds and *ex-officio* county clerk of Lawrence county, and issued commissions to his appointees, running until January 1st, 1879, and until their successors should be elected and qualified.

The same act provided for the election of four justices of the peace in each of said counties, at special elections to be called by the respective boards of county commissioners, when organized, who should hold their offices until their successors should be elected at the general election in 1877, and should qualify.

Prior to said general election the board of county commissioners of Lawrence county spread the following minute on their records: "We will, therefore, call an election for four justices of the peace, and for no other officers;" and appellant, at the proper time, as clerk of said county and in compliance with the provisions of section 5, chapter 27, Political Code,

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made out and delivered to the sheriff, election notices, naming as the officers to be chosen—four justices of the peace—but no others, whereupon this proceeding was instituted by the relator for a writ of mandamus to compel the appellant, as county clerk, to issue notices of election for the election of three county commissioners, one register of deeds, sheriff, treasurer, judge of probate, &c. An alternative writ was issued, and on the hearing the court below awarded a peremptory writ. From this judgment and final order defendant appeals.

Section 5 of chapter 27, Political Code, above referred to, reads as follows: "The county clerks of the several counties shall, at least thirty days before any general election, \* \* \* make out and deliver to the sheriff, coroner or other person to be designated by them, of their respective counties, three written notices thereof for each election precinct." The form of the notice prescribed by the same section, requires that the offices to be filled at such election shall be named therein. In this case the clerk, in the notices made out by him, named only the office of justice of the peace, and this appeal presents the naked question, whether such notices should not have included all other offices of Lawrence county, which under the law are filled by election; or in other words how long are the appointees of the governor entitled to hold, and when should their successors be chosen. Turning to chapter 42, Political Code, providing for the organization of these Black Hills counties, including the county of Lawrence, we find that sections 1, 2, 3 and 4, defines their boundaries; section 5 is repealing in its character, and section 6 reads as follows: "The governor is hereby authorized, and it is made his duty, when the country embraced within said counties herein described comes within the jurisdiction of this Territory, or as soon as practicable, and he can obtain the necessary information after the passage and approval of this act, and without the petition of voters otherwise required, to appoint for each of said counties three county commissioners, who shall constitute the board of county commissioners, one register of deeds, one sheriff, one treasurer, one judge of

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the probate court, one district attorney, one coroner, one superintendent of public schools, and one assessor; and said officers so appointed shall hold their offices respectively until their successors shall be elected and qualified according to law." Section 7 relates to the qualification of the officers so appointed; section 8 provides for the election of justices of the peace at a special election; section 9 defines a quorum of the board, the duties of clerk, etc., and section 10, is as follows: "This act shall take effect and be in force from and after its passage and approval, and it amends and modifies all acts and parts of acts inconsistent with its provisions, so far only as it is necessary to carry this act into effect, but all other such acts, except those bounding and defining counties herein defined, are in force, except so far as this act governs and takes the place of other law." This is all there is of special legislation relating to these counties, and we must look elsewhere for an explanation of some of the phraseology used in this act. It will not be contended but what these Black Hills counties might and could have been organized without any of the provisions of this special act, except those embraced in the first five sections, naming them and defining their boundaries. Sections 1 to 5 inclusive, of chapter 21, Political Code, clearly define the mode and manner, and confer ample power and authority for the organization of new counties, and it seems clear that these statutes must be construed together, chapter 42 as being merely supplemental, for a special purpose, to the sections last cited. They certainly both have the same purpose in view and relate to the same subject-matter.

It is an established rule of law, that all acts *in pari materia* are to be taken together as if they were one law; and they are directed to be compared in the construction of statutes, because they are considered as framed upon one system and having one object in view. (Dwarris on Statutes, 189.) And the Supreme Court of the United States, in the case of *Patterson v. Winn*, 11 Wheat., 385, has laid down the rule that "several statutes that are *in pari materia* are to be construed as one statute in explaining their meaning and import."



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A very cursory examination of the statutes under consideration will conclusively show that they are *in pari materia*, and that the Legislature had the provisions of the general law (chap. 21) in view all the time when framing this special act. By section 6 of the act last referred to, the governor is authorized to appoint the officers for these counties, "without the petition of voters otherwise required;" where and by what law required? The answer is to be found in section 1, chapter 21, "whenever the voters of any unorganized county \* \* shall be equal to fifty or upwards, and they shall desire to have said county organized, they may petition the governor, etc. Why were the Black Hills counties made an exception to this rule? The Legislature took notice of the fact, which was notorious, that there were several thousand voters in these counties, without county government, without courts, and without any of the machinery of the law for the protection of life and property, and the various, vast and valuable interests that had sprung up like magic in that new country; the distance from the capital of the Territory, and there being no United States mail carried into the Hills, communication was slow and uncertain; the desire of the people for county organization was well known, and to have waited for petitions could have served no practical purpose, and would only have prolonged the rule of anarchy and confusion; therefore to save time and hasten the consummation of the purposes of the act, this provision was inserted and the petition dispensed with. And for the same good and cogent reasons, we apprehend, the governor was empowered to appoint all the other officers, except justices of the peace, for these counties. This, we think, is a satisfactory answer to the somewhat specious argument of counsel, contending that the provision authorizing these appointees to "hold their offices respectively until their successors are elected and qualified according to law," must refer to section 15 of chapter 21, and not to section 3, same chapter; and that unless their construction is adopted, "all the legislation in chapter 42, outside of naming and defining the boundaries of said counties, was an idle exercise of power."

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Chapter 21 only authorized the governor to appoint three commissioners, who, after having qualified, should appoint all the other officers. These provisions to which we have referred, together with the one requiring justices of the peace to be chosen at a special election, are the only departures of importance from the general law governing the organization of new counties, found in this special act. Now coming back to section 6, chapter 42, where it provides that the appointees of the governor "shall hold their offices respectively until their successors shall be elected and qualified according to law," we are met with the question, what law is referred to? If this special act had stopped with section 5, could there have been any question as to when their successors would have been elected? Certainly not. Sections 2 and 3, chapter 21, provides that the commissioners appointed by the governor and the officers appointed by them "shall hold their office until the *first general election thereafter*, and until their successors shall be elected and qualified." The officers of Lawrence county were appointed and qualified in the spring of 1877; the "first general election thereafter" occurred on the Tuesday next after the first Monday of November, 1877. (Section 2, chapter 27, Political Code.) Reading these statutes together, can there be any doubt as to the proper construction? Why attempt to make these counties an exception to the well settled rule fixed by legislation governing the period for which persons hold under appointment to an elective office? As we have seen, under the general law relating to the organization of new counties, the officers appointed hold only until the next general election; and section 11, chapter 22, Political Code, provides that appointments to fill vacancies must be made to continue until the next general election and until a successor is elected and qualified; and my attention has not been called to any provision authorizing an appointment to an elective office to extend beyond the next general election, when the people may choose for themselves. We do not say this could not be done by appropriate legislation, but we say it has not, and courts should not, by a forced and strained construction in antagonism to the spirit and letter of general statutes, and the well

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recognized legislative policy of the Territory, do that which the law-making power has carefully and studiously avoided. Much stress has been laid by counsel for appellant on section 15, chapter 21, which provides that the officers of each organized county shall be chosen at the general election in the year 1878, and every two years thereafter. This section has reference to the election for a full term, providing that the election of these officers shall occur at the same time, and making the tenure of office and the time of its commencement, uniform throughout the Territory, and has no application whatever to cases of vacancy, or the election of the successors of officers appointed upon the organization of a new county. Were this not so, and were the construction insisted upon by counsel for appellant correct, then sections 2 and 3 of this same chapter, and section 11 of chapter 22, and the provisions of the section under consideration, could not stand together; for if their reasoning be good in the case at bar, it must prevail in every other case involving the construction of these acts, and consequently no officer can be voted for to fill a vacancy or otherwise, except at the general election in the even years. This cannot be claimed to be the legislative intent.

Our attention has also been directed to section 8 of this special act, as throwing light on the question before us. This section provides for the election of justices of the peace at a special election to be called by the board of county commissioners, and enacts that the justices so elected "shall hold their offices until their successors shall be elected at the general election in 1877, and shall qualify." It is asked if all the officers were to be elected at the general election in 1877, why specify in particular the office of justice of the peace; and it is contended that the naming of one necessarily excludes all others. This by no means follows. The Legislature doubtless considered the law as to the election of the successors of the appointees, fixed and certain; but here they had created an anomaly, had authorized the election of justices of the peace at a *special* election: how long should they hold the office, and where is the provision of law settling the question?

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In order to avoid doubt and confusion, these officers were placed on the same footing with those holding under appointment, and their successors elected at the same time. Can there be any good reason for a construction that requires the officers chosen by the people to retire at the next general election, while those appointed must be permitted to hold over for a year longer? In the absence of any plain and unequivocal statute, we would hesitate long before placing a Legislative body in so unenviable a position before the people.

The view we have taken of the questions presented by this appeal, seems to be in consonance with the generally received doctrine as held in analogous cases. An article in the Florida constitution providing that "when any office from any cause shall become vacant, and no mode is provided by this Constitution, or by the laws of the State for filling such vacancy, the governor shall have power to fill such vacancy, by granting a commission which shall expire at the next election," was held by the Supreme Court of that State to mean that the power vested in the governorship is not a power to fill the office for the unexpired term; that power remains with the people; the power conferred is to provide an incumbent for the office between the date of the removal or death of the regular incumbent, and the filling of the office by an election by the people; and although the Constitution does not fix the precise time for the next election," yet it is the duty of the authorities to see that the time of this election is not indefinitely postponed at the expense of the rights of the people. (*State v. Gamble*, 13 Fla., 9.) The same principles are enunciated in the case of *McAlfee v. Russell*, 29 Miss., 84.

Under a Missouri statute, providing that when any one of the judges of the county court shall vacate his office, for any reason other than the expiration of his term of service, the governor shall appoint "until the next regular election," a suitable person to perform the duties of his office,—it was held that the term of office of a judge appointed by the executive continues only until the next general election, and not till the next regular election of county judges. (*State v. Conrades*, 45 Mo., 45.)

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The Constitution of Oregon provides that in case of a vacancy in the office of Judge, "the governor shall fill such vacancy by appointment, which shall expire when a successor shall have been elected and qualified." This provision is quite vague and indefinite, and it does not appear that the Supreme Court of that State, were able to find anything in their Constitution or statutes that materially assisted them in construing it. Yet in the case of the *State of Oregon v. Johns*, 3 Oregon, 533, that Court say: "The people of Oregon by their Constitution made their judiciary elective, and only gave the executive power to fill temporary vacancies, which should occur between elections. If the people had intended to part with this power of appointing county judges, they would have expressed it; it cannot be inferred. No inference or intendment is ever presumed against the sovereign. Such is the universal rule for the construction of statutes, for they emanate from the sovereign power which, in this State, is the people. They appoint the executive, and he only acts by delegated authority, and this authority cannot be presumed beyond the express words of the grant. And I think the power in this case only extends to the filling a vacancy until the next general election, when the people can regularly exercise their authority in electing officers. I think it is not reasonable to presume that, where the people have reserved to themselves the appointment of an officer, they would confer on the executive the filling of a vacancy in the office, which would extend the time of the appointee beyond a general election, and deprive the whole people of a county from electing their local officers, when they could fill it as conveniently as they appointed the original incumbent." If this reasoning can be applied in a case involving the filling of but one office, how much more forcible will be its application to the case at bar, where the right of the people of Lawrence county to fill by election, not only one office but all their most important local offices, is presented for adjudication. And while properly speaking, there is no sovereignty lodged in the people of a Territory, yet Congress gave in our Organic act the power to the Legislature and governor to determine whether these

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officers should be elected or appointed, and the legislative power, true to the principles of republican government in its simplest form, provided for their election among the earliest enactments on our statute books, and there is no impropriety in saying that the right to choose their local officers, is lodged with the people of this Territory, and for the purposes of this case it matters but little how that right may have been conferred, whether by a Constitutional provision or an act of Congress, aided by their own legislation, the material point is, they possess it, and hence the rule of construction is the same, when various statutes effecting this right are under consideration.

We are clear in the opinion that the voters of Lawrence county had the right under the law to choose all their county officers, that are elective, at the general election in 1877, and that the peremptory writ of mandamus was properly granted.

Two other incidental points are worthy of notice. For what term or period are these officers elected, and when should they qualify? As the statute provides that they shall be elected at the general election in 1878, and every two years thereafter, except commissioners, it follows that the officers chosen at the general election in 1877 were so chosen to fill out an unexpired term, and that their successors must be elected at the general election in 1878. On the other point as to the time when the newly elected officers should qualify, I think there is not much room for doubt or difference of opinion. The appointees are to hold until the next general election, and until their successors are elected and qualify; and in the absence of any statute fixing a particular time, the officer elect is entitled to the office and its emoluments as soon as the result of the election has been officially declared, and he has qualified as required by law. The appointments running only to the next general election, cannot by intendment or construction be made to extend until the first Monday of January, as contended by counsel for appellant; and section 9, chapter 5, Political Code, applies to the qualification of officers elected for a full term, and not those elected to fill vacancies or unexpired terms; it reads as follows: "Except when otherwise

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specially provided the regular term of office of all county-township and precinct officers, *when elected for a full term*, shall commence on the first Monday of January next succeeding their election." The words, "when elected for a full term," necessarily excludes those not elected for a full term, and the fair and reasonable inference is that they are left to enter upon the duties of their office at once.

All the Justices concurring, the judgment of the court below is

AFFIRMED.

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1. **MURDER: INDICTMENT: SUFFICIENCY.** An indictment for murder in the common law form charging the crime to have been committed "wilfully, feloniously and with malice aforethought," is sufficient under the statute without an allegation of "premeditated design to effect the death of the person killed."
2. ———: ———: ———. Murder under the statute not being divided into degrees, and the statutory definition including, in the different subdivisions, both express and implied malice; and malice aforethought, as it has for so long time been construed and come to be understood, embracing both, they are the most apt and appropriate words to be used by the pleader in charging the crime.
3. **INDICTMENT: STATUTORY WORDS.** The rule that the indictment should bring the offense within the words of the statute declaring it, held applicable in its strict terms to cases where the offense is created by statute; or where the punishment has been increased and the pleader seeks to bring the prisoner within the enhanced punishment; or where new ingredients have been added, either limiting or enlarging the original constituent elements of the crime.
4. **MANSLAUGHTER: PREMEDITATION: PASSION AND PROVOCATION.** While the statute defines homicide to be manslaughter when perpetrated without a design to effect death, still if it was perpetrated in the heat of passion engendered by a sudden and sufficient provocation, even though the accused at the instant, and in his frenzy, intended to take life, the law will interpose and say there was no intent, no premeditated design such as is essential to constitute murder.
5. ———: **PROVOCATION: COOLING TIME.** No precise or definite rule can be laid down as to the time within which the blood should cool; each case must be governed by its own circumstances, the character and temperament of the man, the nature of the provocation, etc. *Quere.*—That the question, what is a sufficient cooling time? and the question, what is a sufficient provocation? are both of law, not of fact.

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6. **INSTRUCTIONS: DUTY OF JUDGE.** It is the duty of the Judge to give full instructions covering the entire law of the case, as respects all the facts proved or claimed by the respective counsel to be proved; but if he omits anything, and is not asked to supply the defect, the party remaining silent cannot complain.
7. ———: **REASONABLE DOUBT: DEGREE OF CERTAINTY.** An instruction in which the jury is charged that "in determining the question of doubt, you will act as a prudent, careful business man would act in determining an important matter pertaining to his own affairs," *held*: erroneous. There must be in the mind of the juror an abiding conviction to a moral certainty of the truth of the charge. And that conviction must be such as would lead him to venture to act upon it, in matters of the *highest concern and importance* to his own interest.

*Writ of Error to the Burleigh County District Court.*

On the 24th day of February, 1877, the defendant, Peter Bannigan, was indicted in the District Court of Burleigh County for the crime of murder, in killing one John D. Massingale, alleged to have been committed "wilfully, feloniously, and with malice aforethought."

On this indictment the defendant was tried and a verdict of "guilty of murder as charged in the indictment" found by the jury. Motions in arrest of judgment and for a new trial were entered and overruled, and the defendant sentenced to death. Numerous exceptions were taken during the progress of the trial, which the defendant has, by his writ of error, brought to this court for review, and which are stated in the opinion.

*Erwin & Griffin*, for plaintiff in error.

"This Court has several times granted a new trial when, as it appeared to us, the defendants application to put off his trial should have been granted." (*The People v. Vermilyea*, 7 Cow., 385.) A new trial was granted where the Court below "thought the affidavit too loose in merely stating information and belief of the witness's removal."

In the case of *Hooker v. Rogers*, 6 Cow., 577, the witness was unable to attend, "and this we held sufficient cause for putting off the trial."

In the matter of refusing a continuance, "the inquiry always is, 'has injustice been done?' 'Has the party been injured?'"



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(2 Grah. & Wat. New Trials, 699 and 700; *Ogden v. Gibbons*, 2 Southard's R., 518.)

The accused sometimes has just reasons to complain of oppressive ruling on the part of the Court, in this particular. But the Court will not fail to make proper amends by granting a new trial in every case where it appears that the prisoner has in this way been deprived of a fair opportunity to make his defense. (2 Grah. & Wat. New Trials, 700.)

The majority of the criminal laws will be best maintained and vindicated by giving to each offender a fair and reasonable time to make his defence, and not by forcing him into a trial with indecent haste, when his body and mind, from his unfortunate condition, cannot be supposed calculated to arrange and prepare his defence, either with judgment or discretion. (2 Grah. & Wat. New Trials, 703.)

(1st Greenleaf Ev., sec. 442 Roscoe's Crim. Ev., p. 103.) This man Hood was a soldier; his former testimony is fully corroborated by other evidence in the case. He was, at the hour of his giving testimony, under charges for felony; his captain had tampered with him, his explanation is forced and exhibits such natural characteristics as compel the State to accept his original testimony, after the cross-examination and the re-direct examination. The dramatic effect of his false correction carried the verdict. (Code of Criminal Procedure, § 354.)

"Murder in the first degree, is a *wilful, deliberate, and premeditated* killing. We find that by the omission of the word 'deliberate,' no other word being used capable of conveying the same idea, the indictment fails to describe the crime of murder in the first degree. The indictment being thus defective, the defendant could not have been tried for murder in the first degree." (*State vs. Boyle*, 28 Ia., 525.)

"As already observed, it appears to be everywhere admitted now, that if this form of the allegation does not contain in some way this higher charge," (deliberately premeditated) "it is contrary to our constitutions, to convict a prisoner upon it, as for murder in the first degree, though a statute should so expressly direct." (2 Bishop Crim. Pro., 587, 598, 588, 589, 2d ed. § 587.)

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The indictment must set out, that the killing was wilful and *deliberate*, or otherwise designate the element of crime which the statute makes essential to this degree of the offense. (2 Bishop Crim. Pro., 603 (2 ed.) 592; *State v. McCormick*, 27 Iowa, 402; 27 id., 415; *State v. Boyle*, 28 id. 522; *State v. Knouse*, 29 id. 118; *Fouts v. State*, 8 O. St., 98; *Kain v. State*, 8 O. St., 306; *Hagan v. State*, 10 O. St., 459; *Fouts v. State*, 4 Green, Ia., 500; *Bower v. State*, 5 Mo., 364; *State v. Jones*, 20 Mo., 58; *Johnson v. Comm.*, 24 Pa. St. R., 386; *State v. Reakey*, 62 Mo., 40.)

No legal person of any sort has undertaken to answer the view of legal doctrines thus presented. No one who understands them ever will. (2 Bishop Crim. Pro., 607; Form of Indict., 2 Bishop Crim. Pro., 591, 2d ed.)

In Pennsylvania, and other states which have followed its line of decisions, holding that it is not necessary for the indictment to designate the grade of homicide, and that the common law indictment for murder is sufficient in all cases of murder in the first degree, our conclusion is that these cases are of doubtful soundness on principle; but however this may be in those states, the question is different here, where we have no common law crimes, and where even murder is statutory. *State v. McCormick*, 27 Ia., 402; *State v. Thompson*, 31 id., 393.)

"Although a different practice has prevailed in Pennsylvania, New York and Tennessee, we consider it safest to follow the practice which has prevailed so long in our own State." (*State v. Jones*, 20 Mo., 61.)

The instruction given by the Court, that the jury must exercise the same precaution as they would in ordinary business transactions, is error. It should be as in matters of highest concern and importance. (*State v. Dineen*, 10 Minn., 407; 1 Greenleaf Ev., 2; *People v. Brannon*, 47 Cal., 96; 2 Green Crim. R., 435 and note; *Jane v. Com.*, 2 Met., (Ky.) 33; *Giles v. State*, 6 Ga., 285; *State v. Ostrander*, 18 Ia., 458; 1 Bishop Crim. Pro., 1052.

A reasonable doubt as to the effect of the erroneous charge will be sufficient to avoid the verdict. (1 Grah. & Wat. New Trials, 270; *Wardel v. Hughes & Moore*, 3 Wend., 418.)

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A new trial must be ordered whenever it is necessary, as a matter of right. (3 Estees' Pleadings and Forms, p. 754.) It is error to refuse a new trial when justice requires it. (*Ross v. Austill*, 2 Cal., 183.) Even on principle, there are cases in which a discretionary power might be exercised in favor of defendants, granting them a new trial where they could not strictly claim rights. (1 Bishop Crim. Law, 847.) Humane principles would require that, after a conviction, a prisoner should be indulged with another opportunity to save his life, if anything had occurred upon the trial which rendered doubtful the justice or legality of his conviction. (*Com. v. Green*, 17 Mass., 534.) It is discretionary with the courts to grant new trials, where there has been no error on the trial. (*Com. v. Green*, 17 Mass., 550.)

*G. C. Moody*, for the Territory.

No copy of the affidavit for a continuance is set out in the printed record, and the substance is given differently in different parts of the record, but at the best the reasons given are clearly insufficient to compel a continuance.

The granting or refusal of the motion was largely in the discretion of the Court, and in this case the record shows the discretion to have been wisely exercised, as there were several witnesses produced to the transaction, and some by defendant in his own behalf. (Wharton's Crim. Law, vol. 3, 3020, &c.)

The Court was the trier and sole judge of the *facts* upon the challenge of the juror Driscoll, and decided properly. †

No objection or suggestion as to the order of challenge was made by the defendant, and it is difficult to see how he could be possibly prejudiced by the neglect to follow the order in any event. The statute is merely directory. (22 N. Y., 150, *Sanchez v. People*.)

The neglect to read the indictment or to state the plea forms no ground for a new trial. The causes for a new trial are limited by the statute and this is not found among them. (Revised Criminal Code, § 423.)

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The attention of the court was not called to it. No substantial rights of the prisoner were prejudiced. The jury must have been informed of the issues they were to try, and that is the sole object of the reading of such indictment and statement of the plea, and as we do not find such neglect among either of the causes for a new trial or arrest of judgment, the statute must be held to be only directory, at the least, unless the defendant had seasonably demanded it and it had been refused by the Court.

The re-examination of the witness Hood was in no sense an impeachment of him. He was examined by the defense upon a matter not brought out by the prosecution, and was again brought back upon the witness stand to correct an error of statement made by him upon such examination by the defense. This does not come within the rule laid down by Greenleaf and other authorities. (Greenleaf's Ev. § 442, 443, 444, 445, a and notes; *Sanchez v. People*, 22, N. Y. 147.) Nor do I see any objection or exception noted in the bill of exceptions, although it is recited as a fact in the motion for a new trial and arrest of judgment and in the petition in error that such objection was made and exception taken.

The indictment is a sufficient indictment for murder at common law, and is therefore sufficient under our statute. (*People v. Enoch*, 13 Wend., p. 159; *Fitzgerrold v. People*, 37 N. Y. p. 413.) Our statute does not divide murder into degrees as in the States, from whence the counsel for defendant draw their authorities, and therefore the reasoning of those authorities does not apply. Surely "with malice aforethought," must mean "with a premeditated design," or with some design. And manslaughter in the 1st degree is defined to be a killing *without a design* to effect death, except when perpetrated unnecessarily in resisting an attempt to commit a crime or after such attempt has failed. This then charges murder or it charges no felonious homicide at all.

The record is not at all satisfactory as to the charges given and refused, requested by the defendant, and it is not easy therefrom to tell precisely or substantially what requests were made by defendant or what of such requests were given and

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what refused, but it seems to me the instruction by the Court upon its own motion, which is objected to, will not bear the construction put thereon by defendant's counsel, and is clearly right. First, the Court tells the jury that they must bear in their minds the principles of law, that the prosecution has the affirmative of the issues and must satisfy the jury not only by a preponderance of the testimony, but beyond a reasonable doubt, of the defendant's guilt, before they can convict him, and then in determining and resolving that question of doubt, (not in determining the defendant's guilt or innocence,) they are to act with prudence, and care and prudently and carefully as a business man would act in determining an important matter of his own. And then the Court immediately follows this by telling the jury that to authorize a conviction, the evidence must not only be consistent with the idea and theory of the defendant's guilt, but must absolutely exclude *any* theory of his innocence. Surely this could not be claimed to be prejudicial to the defendant or calculated to mislead them against the prisoner. No rule is better settled than that it is not allowable to take a single sentence of a judge's charge and isolate it from the rest of the charge upon the same point or subject, and allege that as error. The whole of the instruction upon the same subject must be taken and construed together, because it is the whole when taken together that is supposed to produce the impression.

Upon the appeal to the discretion of this Court made by the able counsel for the prisoner, I have only to reply that a careful examination of the record as exhibited to this Court has satisfied me that there was evidence which would have justified the jury in finding a lesser degree of crime, and there is enough to support the present verdict. It can hardly be claimed that it is apparent from an inspection of the record that a preponderance of the evidence is against this verdict and unless it can be so determined, it is not the province of this Court to disturb it.

BENNETT, J.—We have in the record before us, in form, a common law indictment for murder, with a verdict of guilty as charged, and judgment of death. Is this indictment sufficient, under our statute, to sustain this verdict and judgment? Counsel for defendant insist that it is not, and that it charges only manslaughter in the first degree, for the reason that it does not charge, *in haec verba*, the homicide to have been perpetrated “with a premeditated design to effect the death of the person killed.” Murder, as defined by the common law is “when a person of sound memory and discretion, unlawfully killeth any reasonable creature in being, and under the King’s peace, with malice aforethought, either express or implied.” Our statute (§ 242 Penal Code) defines murder as follows:

1. “When perpetrated without authority of law, and with a premeditated design to effect the death of the person killed or of any other human being.

2. When perpetrated by any act imminently dangerous to others, and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual.

3. When perpetrated without any design to effect death by a person engaged in the commission of any felony.”

It will be observed that the words “with malice aforethought” are not employed in our statutory definition, and that a criminal homicide may rise to the higher degree of murder, though wanting in the element of premeditated design. What ingredient, if any, has our statute added to, or eliminated from the crime of murder as it existed at the common law? If no ingredient has been added, and the crime remains substantially the same, though the phraseology used by our statute in defining it may be different, then this indictment must be held good.

The rule contended for by counsel for defendant, that the indictment should bring the offense within the words of the statutes declaring it, is applicable only in its strict terms to cases where the offense is created by the statute, or where the punishment has been increased, and the plea-

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der seeks to bring the prisoner within the enhanced punishment, or where new ingredients have been added either limiting or enlarging the original constituent elements of the crime. But admitting the strictest construction of the rule, our statute provides that the "words used in a statute to define a public offense need not be strictly pursued in the indictment; but other words conveying the same meaning may be used," (§ 221, Crim. Proc.)

Homicide, as we have seen, was at common law, murder when perpetrated with malice aforethought, express or implied. Express malice has no uncertain legal meaning, and is defined when used with reference to homicide, to be "when one with a sedate, deliberate mind, and formed purpose, doth kill another." The legislature of this Territory sought to popularize, so to speak, legal phraseology in framing the provisions of our Penal Code, and to make them plain to the common understanding of the citizen, who is presumed to know their meaning. And with this purpose in view, in drafting the first subdivision of the section referred to, instead of the phrase "with malice aforethought" or "express malice," the language of the best definition of these phrases, conveying their meaning and import is employed: "with a premeditated design to effect the death, &c." But this change in phraseology was deemed necessary from another consideration, which is forcibly stated by Judge Nelson in the case of *The People v. Enoch*, 13 Wend. 159, a case that arose under a statute of which ours is an exact copy. (2 R. S. New York, 657, § 5.) That learned judge uses this language: "Malice aforethought in common parlance, and as originally used, conveyed only the idea of express malice. Its meaning had been enlarged so as to include implied malice, by judicial construction, to define and limit which, was the object and has been the only effect of the fifth section above referred to." Under this judicial construction, malice aforethought, had been made to include both express and implied malice, and would be applicable to the definition of murder as set forth in all three of the subdivisions of section 242 Penal Code; but the first subdivision was, as declared by the supreme court of New York, intended to define murder in case of express malice, and the

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second and third subdivisions in cases of implied malice; and this is in general the line of distinction drawn and observed by the statutes which divide murder into two degrees. Murder under our statute not being divided into degrees, and our statutory definition including in the different subdivisions both express and implied malice, and malice aforethought, as it has for so long time been construed and come to be understood, embracing both, they are the most apt and appropriate words to be used by the pleader in charging the crime. If the indictment charge, in the language of the first subdivision, the homicide to have been perpetrated with a premeditated design to effect death, the premeditated design, or express malice, must be proved. (*The People v. White*, 24 Wend. 520.) And from this it would seem to follow, that in such a case the defendant could not be convicted on evidence of implied malice, though coming clearly within the provisions of the second or third subdivision.

It is true that at common law malice aforethought had a broader signification than it will bear when applied to murder as defined by our statute. Formerly the prisoner might have been convicted upon proof of implied malice, which, under our statute would only amount to manslaughter, where for instance the accused, while engaged in an unlawful act under the degree of felony, killed another against his intention. But this cannot prejudice or jeopardize the rights of the accused, for, in the language of Judge Nelson in the opinion above referred to, "it is the business and duty of the court to see that a proper direction be given to the jury, in point of law, upon the evidence, and if either court or jury err, the appropriate remedy must be sought."

In the case of *The People v. Enoch*, supra, the chancellor uses this language: "From this examination of the subject, I have arrived at the conclusion that a common law indictment for murder is proper under the provisions of the Revised Statutes, and a defendant cannot be convicted on such an indictment, of a felonious homicide with malice aforethought, unless the evidence is such as to bring the case within the statutory definition of murder." And in the case of



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*The People v. Clark*, 3 Seld., 385, (under the same statute) Johnson, J., holds that "the words 'premeditated', 'aforethought', and 'prepenze' possess, etymologically, the same meaning; they are, in truth, the Latin and Saxon synonyms, expressing a single idea, and possess in law precisely the same force. The statute, so far as this term is concerned, has not altered the law."

The court of appeals, in the case of *Fitzgerrold v. The People*, 37 N. Y., 413, decided in 1868, after a careful review of the cases of *The People v. Enoch*, *The People v. White*, and *The People v. Clark*, supra, sustain and re-affirm the doctrine that a common law indictment, charging the offense of murder to have been committed "willfully, and of malice aforethought," is sufficient under the statute. And in the case of *Kennedy v. The People* 39 N. Y., 245, the same court held that "an indictment for murder, in the common law form, charging the killing with malice aforethought, is good, notwithstanding our statute has divided the crime of murder into different degrees."

And the doctrine is further laid down in that case that "the statute is not a rule of pleading, but a guide to the conduct of the trial, prescribing the proofs requisite to a conviction."

That a common law indictment for murder, under the statutes of New York, even since the crime has been divided into degrees, is sufficient, may be considered the settled doctrine of that state.

In California, murder is divided into two degrees, and defined as follows: "All murder which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder in the first degree, and all other kinds of murder shall be deemed murder in the second degree." Under this statute the supreme court of that State has uniformly held an indictment in the common law form sufficient, charging the offense to have been committed with "malice aforethought." (*The People v. Lloyd*, 9 Cal. 55. *The People v. Dolan*, id. 576. *The People v. Cronin*, 34 Cal. 191. *The People v. Martin*, 47 Cal.

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101.) The force of these authorities is not weakened, by the consideration that the specific definition of the degrees, is preceded by the general common law definition of the crime in the California statute. Our statute says "homicide is *murder* in the following cases." The question recurs, what is *murder* as here used? Being a word defined by law, it must be construed according to its legal meaning. (§ 220. Crim. Proc.) Therefore supplying the definition, or all that is implied in the single word, and we have in general arrangement the California statute, without the division into degrees.

In the State of Pennsylvania, where murder in the first degree is defined to be "by means of poison or lying in wait, or in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, or by any other kind of willful, deliberate and premeditated killing," the indictment in common law form, charging the offense to have been committed with "malice aforethought," has always, "without variableness or shadow of turning," been held sufficient.

The contrary doctrine has been held by the supreme courts of Ohio (*Fouts v. The State*, 8 Ohio St. 93) and Iowa (*The State v. McCormick*, 27 Iowa 402,) and insisted upon in a few dissenting opinions. (Bacon, J. in *Fitzgerrold v. The People*, 37 N. Y. 685, and Dixon, C. J. in *Hogan v. The State*. 30 Wis. 442.)

Wharton, in his work on Criminal Law, Vol. 2, § 1115 says: "According to the great weight of authority, a common law indictment for murder is sufficient to support, under the statutes, murder either in the first or second degree," citing in support of the proposition a long array of authorities, not necessary here to refer to.

But it seems unnecessary to pursue the inquiry further. We have not been referred to one single authority, holding a common law indictment insufficient under a statute that leaves murder as at the common law undivided into degrees.

Bishop, who maintains the doctrine laid down in the cases of *Fouts v. The State*, and *The State v. McCormick*, *supra*, in his work on Criminal Procedure, (Vol. 2. § 586) uses the following language: "The result is, that, according alike to the

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principles of the common law, to those principles of natural reason and justice which are inherent in the case, and to the provisions of State and national Constitutions, the indictment for murder, *where the statute divides it into two degrees*, should, if murder of the first degree is meant to be proved against the prisoner, contain those allegations which show the offense to be in this degree, \* \* \* If murder in the second degree only is to be proved, then in all cases, an indictment for murder, drawn in any of the common law forms, will be adequate. *Thus it is with the two degrees of felonious homicide which we now call murder and manslaughter.*" The only degrees known to our statute.

From these considerations we are clearly of the opinion, and so hold, that the indictment in this case is sufficient. We have no disposition nor wish to abandon the well trodden highways of judicial construction, along which, for so many cycles, have been heard the foot-falls of genius, for the obscure and intricate bridle paths, blazed out by a few bold and daring adventurers, who seem to be in search of scenery rather than safety, and who prefer the mists of speculation to the sunlight on the mountain tops of experience. Nor are we anxious to create for the opinions of this court a species of cheap notoriety, by arraying ourselves against the best legal thought of the past and present, in overturning principles and precedents, sanctioned alike by reason and common sense, and which have received the support and enlightened judgments of the brightest and clearest intellects that have ever adorned the bench or guided the author's pen.

The mere love of novelty or the vain ambition to be considered original do not furnish a sufficient apology for departing from the well settled forms and principles of pleading and procedure in criminal cases, when such departure is not made necessary by some legislative enactment, or dictated by sound considerations effecting the better administration of justice.

Certainty and stability in the rules governing judicial proceedings should never be sacrificed to hypercritical nicety

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in phraseology or pedantic finessing in the use of words. *Stare decisis* is a maxim founded in wisdom, and when intelligently applied and adhered to with a sound discretion will "frae monie a blunder free us, and foolish notion."

On the trial the Judge gave to the jury the following instruction: "The prosecution has the laboring oar, or the affirmative of the issues, and must satisfy you, not only by a preponderance of testimony, but beyond a reasonable doubt of defendant's guilt. By doubt I do not mean that you must be satisfied beyond the possibility of a doubt, but in determining this question of doubt you will act as a prudent, careful business man would act in determining an important matter pertaining to his own affairs."

The latter part of this instruction is assigned as error. It is insisted by counsel for the prosecution that this instruction does not direct the jury that in determining the question of defendant's *guilt*, they are to "act as a prudent, careful business man would act in determining an important matter pertaining to his own affairs," but only in *resolving* the question of doubt.

The provision of our statute (§ 349, Crim. Proc.,) that "a defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt as to whether his guilt is satisfactorily shown, he is entitled to be acquitted," is but the assertion of the well recognized common law principle, and gives to defendant the benefit of every reasonable doubt. And no view or consideration by the jury of the facts and circumstances in evidence, in arriving at a conclusion as to the guilt of the defendant, and in which the primary and essential element of reasonable doubt is ignored, can receive the sanction of the law.

It is, therefore, of the gravest importance that on this point the jury should receive proper direction, that the rights of the defendant may not be abridged nor the wise and wholesome rules relaxed, by which the legal certainty of his guilt is established.

What does the Judge mean when saying, "in *determining* this question of doubt?" We must admit that the propo-

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sition is not altogether free from perplexity. But does not the *determination* of necessity involve the *character* of the doubt? and on this point the Judge intimates but one qualification, and that is, it must not be a *possible* doubt, which in law is understood to be excluded by the word *reasonable*, previously employed in the charge. The import of the instruction and the sense in which we may reasonably presume it to have been understood by the jury, is, that they should be satisfied beyond a reasonable doubt of defendant's guilt, and in determining the character of that doubt, and its application to the evidence in the case, they should act as a prudent, careful business man would act in determining an important matter pertaining to his own affairs. And in this light the instruction is clearly erroneous.

Had the Judge told the jury, "that in determining the question of *defendant's guilt*, you will act as a prudent, careful business man would act in determining an important matter pertaining to his own affairs," we apprehend counsel for the prosecution would not for a moment insist upon its correctness. But the determination of the question of guilt is reached through a proper understanding of all the facts and circumstances in evidence, properly weighed and understood in the light of the law applicable, and if a mistake is made in any of the intermediate steps taken, the probabilities are that an erroneous result may be attained. The ultimate question of guilt may turn on the very point of *reasonable doubt*, and consequently "in determining this question of doubt"—to use the language of the Judge—the jury are determining the very question in issue, to-wit: the defendant's guilt.

On this point Greenleaf, in his work on Evidence (Vol. 1, § 2,) lays down the doctrine as follows: "By *satisfactory evidence*, which is sometimes called *sufficient* evidence, is intended that amount of proof, which ordinarily satisfies an unprejudiced mind, beyond reasonable doubt. The circumstances which will amount to this degree of proof can never be previously defined; the only legal test of which they are susceptible is their sufficiency to satisfy the mind and conscience of a com-

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mon man; and so to convince him that he would venture to act upon that conviction, in matters of the *highest concern and importance* to his own interest."

In the case of *People v. Brannon*, 47 Cal., 96, the jury were told that it was their duty to convict if they should "be satisfied of the guilt of the defendant to such a moral certainty as would influence the minds of the jury in the *important affairs of life*;" and the Court say: "The judgment of a reasonable man in the ordinary affairs of life, however important, is influenced and controlled by the preponderance of evidence. Juries are permitted and instructed to apply the same rule to the determination of civil actions involving rights of property only. But in the decision of a criminal case involving life or liberty, something further is required. There must be in the minds of the jury an abiding conviction to a moral certainty, of the truth of the charge, derived from a comparison and consideration of the evidence. They must be entirely satisfied of the guilt of the accused."

This doctrine is strongly implied in Chief Justice Shaw's definition of a reasonable doubt, (*Commonwealth v. Webster*, 5 Cush., 320,) perhaps the most accurate that has ever been given: "It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge; a certainty that convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it."

Human life is too sacred to be weighed in the coarse balances by which men adjust even the important affairs of life; scales which turn at the touch of a bare preponderance, by which the issues are determined, but which are not sensible to the finer elements of purpose and intent which lie hidden in act and deed.

Purpose and intent can only be shown by external conduct, which fallible man is too frequently unable to read aright, and only too willing to labor to make it read wrong; therefore, before he condemns, even though the scales may swing

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far from an even poise, he must be able to say that he feels an abiding conviction to a moral certainty of the truth of the charge. The instruction under consideration, in our judgment, laid down a very different rule, and one which cannot be sustained either on principle or authority.

The facts of the homicide in this case may be briefly stated as follows: The deceased, John D. Massingal, a soldier, was on the evening of the 25th of December, 1876, in defendant's place of business, a saloon, in the town of Bismarck, with several of his comrades. After some talk in which the deceased spoke about fighting, but not directing his remarks to any particular individual, spoke of defendant's place as a fraud, etc., he and the defendant engaged in what appears to have been a mutual combat, in which the deceased pushed defendant to the wall and struck him several times over the head; the defendant finally got loose, went into the back room, and in a moment or two, as stated by one witness, returned with a revolver and shot the deceased while he was standing by the stove, firing three times, twice before he fell and once after he fell. At the second shot the deceased fell; and as he fell he exclaimed, "Oh! my God!" when the defendant said, "this is a damned pretty time to beg," and fired the third shot which took effect in the back. There is nothing in the record to show any former grudge or quarrel. There is some contradictory evidence as to the use of a slung shot, and as to deceased having kicked one of the female inmates of the house, and as to some threats made by deceased, which we do not consider necessary to notice.

Under this evidence the defendant asked the Court to instruct the jury as follows: "I charge you as a matter of law, that there was not sufficient cooling time between the first assault and the shooting, and that it was all one transaction, and must be taken together." We think the question is here fairly presented by the record, could this homicide be considered to amount to anything more than manslaughter? Or in other words, was it committed in the heat of passion, upon a sudden and sufficient provocation? and if so, was there time for the blood to cool? Whether it was so committed was a question for the jury under proper instructions.

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On the point of cooling time, as to whether it is a question of law for the court, or one of fact for the jury, the authorities are in seeming conflict. Bishop, (2 Criminal Law, § 712,) says: "But though each case is to be decided by its circumstances, the question is one of law, whether in the particular circumstances, the blood has had sufficient cooling time." And in the section following, he says: "The doctrine, let it be repeated, is, that the question, 'what is a sufficient cooling time?' and the question of 'what is a sufficient provocation?' are both of law, not of fact," and citing in support of the doctrine, numerous English and American cases. And Wharton, (Crim. Law, § 984,) uses this language: "Under such provocations as these, it has been said that whether the blood had time to cool or not, is a question for the court, and not for the jury," citing *State v. Sizemore*, 7 Jones, (N. C.) 206. No precise or definite rule can be laid down as to the time within which the blood should cool. Each case must be governed by its own circumstances; the character and temperament of the man; the nature and degree of the provocation, etc.; but if we should adopt the rule that it is a question of law for the Court, and the Court's attention having been directed to the point, he should have charged the jury thereon; if he thought there had been sufficient cooling time, he should have told the jury so. But we are of the opinion that the Judge who tried the cause below would scarcely have been willing to assume the responsibility of telling the jury that blows were not a sufficient provocation, if they found the fatal shot was fired in a passion engendered thereby, or that two or three moments were a sufficient time in which the blood might cool. That the homicide was perpetrated with a deadly weapon, does not, *ex necessitati*, swell the homicide to the degree of murder. While our statute defines homicide to be manslaughter when perpetrated without a design to effect death, still, if it was perpetrated in the heat of passion, engendered by a sudden and sufficient provocation, even though the defendant at the instant, and in his frenzy, intended to take life, the law, in its tender regard for human frailties, will interpose and say there was no intent,



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no premeditated design such as is essential to constitute murder. On this point the judge's charge is as silent as the grave. No reference is made even to the distinction between murder and manslaughter, further than to read to the jury from the statutes. We think on a point so vital to the rights of the defendant, the Judge should not have contented himself with merely submitting to the jury the provisions of the Penal Code without note or comment. It is undoubtedly the duty of the Judge to give full instructions to the jury, covering the entire law of the case, as respects all the facts proved, or claimed by the respective counsel to be proved. Still, if he omits something, and is not asked to supply the defect, the party who remained silent cannot complain. But in this case, as the record discloses, the attention of the court was called to the direct point, and he was asked to rule upon it. And in a case of such momentous importance to the accused, where his life (for which a man will give all he has) hung trembling in the balances; where the evidence showed a sudden combat, (passion,) with so brief a time intervening until the fatal shot was fired; we cannot understand how the Judge, even without being requested, could pass the question by. Had the Judge, being on the ground, and seeing all the witnesses, and hearing all the evidence, decided there was not sufficient provocation, or that there had been sufficient cooling time; or had the question been left fairly to the jury under proper instructions, we might hesitate before disturbing the solemn judgment of death. But under all the facts disclosed by this record, we are of the opinion, and such is the judgment of this Court, that the judgment of the Court below must be reversed, and the cause remanded for a new trial.

SHANNON, C. J., concurring.

BARNES, J., concurs on question of sufficiency of the indictment, but dissents on the other points.



# APPENDIX.

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## DISTRICT COURT PROCEEDINGS.

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### THE LAW OF LIBEL.

CHARGE TO THE JURY BY SHANNON, JUDGE, IN THE DISTRICT COURT  
FOR YANKTON COUNTY.

THE TERRITORY OF DAKOTA, }  
V. }  
MARIS TAYLOR AND JAMES TAYLOR. }

*Gentlemen of the Jury:—*

This is an indictment for an alleged libel. Our law declares that on the trial of such indictment, the jury have the right to determine the law and the fact.

First—What is the law of libel?

Every person has (subject to the restrictions and qualifications provided by law), the right of protection from bodily restraint or harm, from personal insult, and from defamation.

Defamation is effected by libel or slander. But apart from any civil action for mere pecuniary damages, the law declares libel to be a public offense, and to be prosecuted in the name of "the Territory of Dakota."

A public offense is an act or omission forbidden by law, and to which is annexed, upon conviction, a punishment prescribed in our Penal Code. The commission of a public offense affects, therefore, the peace and dignity of the entire community, to-wit: "of the Territory;" and so this indict-

ment concludes. Although it alleges the perpetration of a libel, and also that such libel is "to the great damage and scandal of John L. Pennington," yet by your verdict (if it should be against the defendants) you cannot award any "money damages" to that individual.

Our Penal Code defines the nature of the various public offenses, and classifies libel as one of them, and as an offense against the person and his good name, or reputation. Any malicious injury to good name, other than by words orally spoken, is a libel. To explain:—any malicious publication by printing, which exposes any person to hatred, contempt, ridicule or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation, is a libel under our Penal Code. And "every person who willfully, and with a malicious intent to injure another, publishes any libel, is guilty of a misdemeanor."

What is the meaning of this word "willfully?"

The term "willfully," when applied to the intent, by which an act is done, implies simply a purpose or willingness to commit the act referred to.

What, in the next place, is the meaning of the other word "malicious," in the above definition?

The term "malicious," when employed (as it is above) to designate, or qualify, the intent with which an act is done, imports a wish to vex, annoy, or injure another person, established either by proof or presumption of law.

When is an injurious publication presumed to have been malicious?

Our Penal Code, section 312, declares that an injurious publication is presumed to have been malicious, if no justifiable motive for making it is shown.

But how does our Penal Code guard the rights of defendants?

The answer is, that by section 313, "in all criminal prosecutions or indictments for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted."

Again, does our Penal Code any further guard the rights of the accused persons?

Yes; and in the interest of the "newspaper press." For by section 316, that Code declares that "no reporter, editor, or proprietor of any newspaper, is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceedings, or of any statement, speech, argument, or debate in the course of the same, except upon proof of malice in making such report, which shall in no case be implied from the mere fact of publication."

Is this privilege expressly extended to reporters, editors, and proprietors of newspapers—plain and clear—or is it not?

Transpose it and see. For a fair and true report of any judicial, legislative, or other public official proceedings, or of any statement, speech, argument, or debate in the course of the same, no reporter, editor, or proprietor of any newspaper, is liable to any prosecution. The non-liability for such fair and true report has one exception, to-wit: except upon proof of malice in making such report, etc.

By section 317, it is prescribed that libelous remarks or comments connected with matter privileged by the last section (to-wit, section 316,) "receive no privilege by reason of their being so connected."

But what if such report in a newspaper should be neither fair nor true? What if it should be false?

These things are for you to inquire into and determine.

All the authorities quoted agree, I believe, that malice on the part of a publisher of a paper, is conclusively presumed, or inferred, if the publications are false.

In this case you have, I repeat, the right to determine the law and the facts. In case of a reasonable doubt as to whether the guilt of the defendants is satisfactorily shown, they are entitled to be acquitted. But the doubt must be reasonable, and must not spring merely from a wish or desire to acquit irrespective of the law and the evidence.

P. C. SHANNON,  
Judge.

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After being out all night the jury came in and, being called, their foreman presented the following paper, to-wit:

COURT ROOM, December 23, 1877.

*To His Honor, Judge Shannon:—*

Will you please answer a few questions and oblige this jury, as we cannot agree:

1st. Are we compelled by our oaths, as jurors, to return a verdict in favor of plaintiff, if the statements made in said publication are proven to be untrue, notwithstanding the article states that they are so informed, and they feel it their duty to make public?

2d. Can we return a verdict in favor of defendants if we believe these statements were untrue, and were made without malice or willfully intended to injure the parties mentioned in said publication, but for the public good?

3d. Was it necessary for the defendants to prove that they were in possession of facts to sustain their charge?

J. C. ENGLISH,  
Foreman.

Accordingly on Monday, the 24th day of December, the Court gave the following written charge to the jury, being in compliance with section 384, of Code of Criminal Procedure, which makes it obligatory upon the Court to give the jury further instructions when requested so to do:

*Gentlemen of the Jury:—*

Your written requests for further instructions, have imposed an unsought duty on me, and have necessitated a further examination of the law of libel as it exists in this Territory.

According to our Code, the freedom of the press consists in publishing the truth with good motives and for justifiable ends: and in publishing all such fair and true reports as are embraced within section 316.

Formerly, in criminal prosecutions, the truth could not be pleaded in defense. Hence arose the common maxim: "The greater the truth the greater the libel," which subjected the old laws on this subject to a great deal of ridicule and contempt.

Happily our law, following modern State constitutional provisions and examples, makes the truth a defense when published with the motives and for the ends already named.

Broadly viewed, proof of the truth of the charge alone is not sufficient in every case; for there may be cases where the matter published, because of its obscenity or blasphemy, is not fit to be spread before the public, whether true or false.

In my first charge, I quoted section 316 of our Penal Code, in reference to the privileges of reporters, editors, or proprietors of newspapers. With this exception of non-liability for a fair and true report of such proceedings, etc., our Code

seems to hold this class of persons to the same rigid responsibility with all other persons who make injurious publications. And our Code, in this respect, appears to be in consonance with the legislation of (to say the least), two of the most enlightened and liberal States of the Union.

The Legislature of the State of New York, in the year 1854, enacted a statute from which ours is framed, as follows: "No reporter, editor, or proprietor of any newspaper, shall be liable to any action or prosecution, civil or criminal, for a fair and true report in such newspaper, of any judicial, legislative, or other public official proceedings; or of any statement, speech, argument or debate in the course of the same, except upon actual proof of malice in making such reports, which shall in no case be implied from the fact of publication. Section 2. Nothing in the preceding section contained shall be so construed as to protect any such reporter, editor or proprietor from an action or indictment for any libelous comments or remarks superadded to, and interspersed or connected with such report." (See our section 317.)

The Penal Code of California adopted as late as 1872, on the subject of libel, is almost *verbatim* the same as ours. (See Cal. Penal Code, § 249 to 257, inclusive.)

"It is no defense," (says Judge Cooley—Const. Lim., 455,) "that they"—injurious communications or libels "have been copied with or without comment from another paper; or that the source of the information was stated at the time of the publication; or that the publication was made in the paper without the knowledge of the proprietor, as an advertisement or otherwise; or that it consists in a criticism on the course and character of a candidate for public office."

A criticism is one thing, and a libel is another. A comment, or judgment, passed or expressed on acts done, or actual conduct, is far different from a false aspersion or a malicious defamation. Criticism upon public men or officers, their actions, character and motives, is not only recognized as legitimate, but large latitude and great freedom of expression permitted, so long as good faith inspires the publication, and malicious injury to reputation avoided. There are cases where it is clearly the duty of every one to speak freely what he may have to say concerning public officers, or those who may present themselves for public positions. Through the

ballot-box the electors approve or condemn those who ask their suffrages; and however emphatic the condemnation, and upon whatever grounds, no action will lie therefor. Some officers, however, are not chosen by the people directly, but designated through some other mode of appointment. But the public have a right to be heard (by the appointing power) on the question of their selections; and they have the right, for such reasons as seem to their minds sufficient, to ask for their dismissal afterwards. They have also the right to complain of official conduct affecting themselves, and to petition for a redress of grievances. A principal purpose in perpetuating and guarding the right of petition is to insure to the public a right to be heard in these and the like cases. To illustrate:—in a case in New York, a party was prosecuted for a libel contained in a *petition* signed by him and a number of other citizens of his county, and presented to the appointing power, praying for the removal of the plaintiff from the office of district attorney of the county, which office, the petition charged, he was prostituting to private purposes. The case involved the right of petition; and the highest court of that State held that the communication was privileged, and could not support an action for libel, unless the plaintiff could show that the petition was malicious and groundless, and presented for the purpose of injuring his character.

A similar ruling was made by the Supreme Court of Pennsylvania, where a party was prosecuted for charges against a justice of the peace, contained in a deposition made to be presented to the governor of that State, who had the appointing power.

This rule protecting the right of petition, is subject, however, to this qualification, that the petition or remonstrance must be addressed to the body or officer having the power of appointment or removal, or the authority to give the redress or grant the relief which is sought; or at least that the petitioner should really and in good faith believe he is addressing himself to an authority possessing power in the premises.

But is the case before you, gentlemen of the jury, one claiming to be a petition to the appointing power, for the removal of the governor of this territory, or for his discontinuance as such? Has it been at all pretended that it is such a case?



I have spoken of the difference between libel and that latitude of criticism upon acts done, which is allowable. In the well-known New York case of *Root v. King*, the Supreme Court held that the publication in a newspaper of a false libel, in relation to a candidate for public office (to-wit, a candidate for the office of lieutenant governor), though such publication was by a voter and the editor of the paper, in the course of a contested election, was not an exception to the general rule of liability for such false libel.

In my first charge to you, I stated that malice on the part of the publisher is conclusively presumed, or inferred, if the injurious publication is false. Our Code (section 312) declares that "injurious publication is presumed to have been malicious if no justifiable motive for making it is shown."

Now, what, under our Code, amounts to a justification? The answer is, that the accused may justify, by giving the truth in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true and was published with good motives and for justifiable ends, the party shall be acquitted.

If the prosecution shows the falsity of the matter contained in the publication, malice is, *prima facie*, implied. The falsity, in other words, is *prima facie* evidence of malice; and proof of justification or excuse lies on the accused. In the New York case last quoted, it was held that malice will, in such case, be implied from the nature of the publication itself, or from its falsity; and the defendant is then bound to show its truth, in order to justify. And this is what was meant and intended in the first charge to you in regard to the presumption growing out of the falsity of an injurious publication.

If the prosecution proves the falsehood of the statements in a libelous article, and the accused offers no evidence whatever of any kind, it then becomes a conclusive presumption of malice both in fact and at law. You will remember that the defendants in this case, did not produce a solitary witness before you. All the evidence has been produced by the prosecution. The truth of the charges in the defendants' newspaper was not attempted to be shown.

So far as the matters at issue in this case are concerned, the only other justification in our Code is contained in section 316, already referred to. Editors and proprietors of newspapers are justifiable in publishing such fair and true reports of proceedings, statements, speeches, arguments and debates as are mentioned in that section. And in making such fair and true reports they are not liable to prosecution, except upon proof of malice as therein set forth. In such cases the prosecution must give actual proof of malice. And these explanations bring me to consider the main points addressed to me by you.

If the statements made in the publication set forth in this indictment are proved to be untrue, beyond a reasonable doubt, then it follows that it constitutes no defense, merely and of itself, to allege that "the article states that they," the defendants, "are so informed, and they feel it their duty to make public."

It is no excuse for a false libel—if you believe it to be such—to allege, either in the libel itself or otherwise, that the publishers were merely informed of its correctness, and that, therefore, they felt it to be a duty to give such false information to the public. There would be no legal redress for defamation of character, if such a false principle should prevail. For every slander and libel, the flimsy excuse would be, "why, I was told so, and I felt it to be my duty to spread it and to make it public." Informants would be plenty, and reputation would be worse than an empty bubble.

The object of a good government is to protect reputation, as well as life, and liberty, and property. With honorable members of society, character is as dear and valuable as any of the others. If you believe, beyond a reasonable doubt, that the article in question is not a fair and true report of public official proceedings, but unfair and untrue, and that the accusations contained in the article are false, it is for yourselves to say that there is an absence of that willfulness and malice essential to convicting persons for the publication of a libel.

The misdemeanor in this case consists in publishing a libel willfully and with a malicious intent to injure another. You must find each one of the elements of the offense, beyond a

reasonable doubt; that there is a libel, that it was published by the defendants, willfully and with such malicious intent to injure John L. Pennington.

I have defined for your instruction what is libel? what is the meaning of the words "willful" and "malicious?" I have repeated the words of our Code that "an injurious publication is *presumed* to have been malicious, if no justifiable motive for making it is shown." I have also given you such other explanations in regard to malice as my judgment dictates to be correct and just. It is now for you to find what justifiable motive these defendants have shown to you. Whatever evidence of that nature or of any kind for the defendants, you may find in the testimony of the prosecution, must go in favor of the accused. Examine it all. Weigh everything in evidence carefully.

It remains now for you, gentlemen of the jury, to take the responsibility. You have my two charges which you will consider together. In determining the law and the fact, each man of you is a sworn judge, and you must, in that capacity, divest yourselves of all prejudices and partialities, if any such you have; and you must dispassionately examine the publication which is the ground of this prosecution. You are not to be guided by ties of friendship, or by political prejudices. You must decide without fear, favor, or affection, as upright judges on your oaths as you will answer to God and your country. Consequences you should disregard, and you must firmly do your duty. Acquit, if the defendants are innocent; convict, if they are guilty.

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#### IMPEACHMENT OF VERDICT BY JURORS.

THE TERRITORY OF DAKOTA, }  
   v. }  
 MARIS TAYLOR AND JAMES TAYLOR. }

Indictment for libel. Motion for a new trial.

Messrs. *Spink* and *Wheeler*, attorneys for the motion.

Messrs. *Faulk*, *Gamble* and *West*, contra.

#### OPINION BY SHANNON, J.

The jury rendered a verdict of guilty on the 24th of December last, and on the same day the defendants' counsel gave

oral notice of a motion for a new trial, specifying the alleged error in the charge, afterwards embodied in the written motion, which was filed January 12th, 1878. Besides this alleged error in law, the written motion contains two other reasons: First, that "after the jury had retired to deliberate upon their verdict, and while they were so deliberating, they read and examined the Statutes of Dakota, and other works of law on the subject of libel," and secondly, that "after the jury had retired to deliberate upon their verdict, and were so deliberating, one of the bailiffs, to-wit: Warren Osborne, was present in the room with said jury, and talked with them." This last point was, however, formally withdrawn by defendants' counsel, as per writing on file, leaving only the two other specifications as the grounds.

When the motion came on for hearing, counsel for defendants, to support the allegation of irregularity, or misconduct of the jury in examining the Statutes and other works of law, offered in evidence the affidavits of J. C. English and Wm. H. Dale, two of the jurors, sworn to on the 9th and 10th of January, and filed on the 12th.

Counsel on the other side objected to the reception of such evidence, on the ground that the affidavits of jurors cannot legally be introduced to impeach, or set aside their verdict.

The main stress of the very able arguments on both sides was applied to this point, and as no precedent has as yet been established in this territory, the grave importance of the question must be my excuse for the time and labor bestowed upon its consideration.

Under this head, the first inquiry is, as to the competency of a juror to testify to the misconduct of himself or of his fellows. On this subject, Wharton on Cr. Law, 7th ed., § 3328, states that "though the former practice was different, it is now settled in England that a juror is inadmissible to impeach the verdict of his fellows. 'It would open each juror' declared Mansfield, C. J., 'to great temptation, and would unsettle every verdict in which there could be found upon the jury a man who could be induced to throw discredit on their common deliberations.'" And further says Mr. Wharton: "In this country the English rule has generally been adopted, though the affidavits of jurors will be entertained for the purpose of explaining, correcting or enforcing their verdict."

In 1 Greenleaf on Evidence (13th edition) § 252, a, it is said that "on similar grounds of public policy, and for the protection of parties against fraud, the law excludes the testimony of *traverse jurors*, when offered to prove misbehavior in the jury in regard to the verdict. Formerly, indeed, the affidavits of jurors have been admitted in support of motions to set aside verdicts by reason of misconduct, but that practice was broken in upon by Lord Mansfield, and the settled course now is to reject them, because of the mischiefs which may result if the verdict is thus placed in the power of a single jurymen."

In 3d Wait's New York Practice, p. 187-8, it is also stated that "on motion to set aside the verdict of a jury for misconduct, the evidence must be derived from the affidavits of persons other than the jurors, for while the affidavit of a juror may be received in support of his verdict, it will not be received to impeach it." Quoting *Green v. Bliss*, 12 How., 428; *Clum v. Smith*, 5 Hill, 560; *Dana v. Tucker*, 4 Johns., 489.

In 3d Estee's Pleadings, page 587, under the head of "Impeaching Verdict," on the ground of misconduct, it is asserted that the affidavits of jurors are not admissible to impeach their verdict for irregularity or misconduct of themselves or their fellows. Quoting, apart from California cases, the following: *Reins v. People*, 30 Ills., 256; *Hughes v. Lister*, 23 Ind., 396.

In Tillinghast & Shearman's Practice, vol. 2, p. 563, it is said that "the affidavits of jurors are not admissible in evidence to show that they were guilty of misconduct during the trial or consultation." But they are admissible to prove an attempt on the part of a successful party to tamper with the jury, as also in support of the verdict.

In Troubat & Haly's Penn. Practice, vol. 1, p. 532, the English rule is stated, and it is said that "the courts of this country incline to the same result;" quoting numerous authorities. And in Lewis' Criminal Law, page 407, the late Chief Justice Lewis, of Pennsylvania, reviewing the authorities, asserts that "there seems at this day but one opinion upon the subject, and that opinion is decidedly adverse to receiving evidence from such a source. In Pennsylvania, it will be found that the weight of authority is against receiving the testimony of jurors to impeach their verdict." In *U'laggage v. Swan*, 4 Binn.

Penn., 157, Yeates, J., delivered a very able opinion in opposition to receiving the affidavits of jurors to invalidate their verdicts. This opinion is highly commended by the reporter in 1 Coxe's Rep., 32, and is cited by Chancellor Kent, with approbation, in 2 John. Chan. Cas., 349

In 1 Archibold, 668, Mr. Waterman, in his notes, declares that "it is now well settled in England, and with a few exceptions, in the United States, that such affidavits cannot be received.

In Graham & Waterman on New Trials, vol. 3, p. 1428, the following reasons are given why affidavits of jurors to impeach their verdict should not be received: 1st. Because they would tend to defeat their own solemn acts under oath; 2d, Because their admission would open a door to tamper with jurymen after they had given their verdict; 3d, Because they would be the means, in the hands of a dissatisfied juror to destroy a verdict at any time after he had assented to it.

In Nash's Pleading and Practice, vol. 2, page 1042, the following language is used: "The affidavits of jurors may be received to impeach the conduct of other persons, like a party; but not to show misconduct on their own part, or that of their fellow jurors. Nor will the affidavit of third persons, as to what they heard jurors say after being discharged, be admitted."

In Wisconsin, in a case in which Dixon, C. J., gave the opinion of the Supreme Court in 1864, it was held that "the affidavits of jurors to their own misconduct cannot be received for the purpose of impeaching their verdict." Quoting 1 Gra. & Wat. on New Trials, 111, and cases cited. See *Edmister v. Garrison*, 18 Wis., 632; also *Shaw v. Fisk*, 21 Wis., 369.

The Supreme Court of Minnesota, in three cases, has excluded such affidavit. (*St. Martin v. Desnoyer*, 1 Minn., 159; *Knowlton v. McMahon*, 13 Minn., 386; *The State v. Stokely*, 16 Minn., 282.)

In *The State v. Underwood*, 57 Mo., 40, (1874), it is held that "the rule is perfectly settled, that jurors speak through their verdict, and they cannot be allowed to violate the secrets of the jury room and tell of any partiality or misconduct that transpired there, nor speak of the motives which induced or operated to produce the verdict. But they may testify in support of their verdict," etc.

This question was elaborately considered, and the leading authorities collated and reviewed in *Woodward v. Leavitt*, 107 Mass., 453, and the doctrine was declared to be as above stated.

In Vermont the rule is that "the affidavit of a juror shall not be received to prove what passed during the investigation of the cause in the jury room." This rule has been applied there to exclude proof of statements of facts made by jurors to their fellows. (*Robbins v. Windover*, 2 Tyler's Rep., 11.) It has also been applied there to exclude evidence of a mistake in point of law, the court in the latter case declaring that the oftener it is argued they are more confirmed in the correctness of former decisions that the affidavits of jurors cannot be read to "disclose the deliberations of the jury room." (*Harris v. Huntington*, 2 Tyler, 147.)

In *The State v. Freeman*, 5 Conn., 348, it was held that "a juror is an inadmissible witness to prove the misconduct of his fellow-jurors, for the purpose of impeaching their verdict," Hosmer, C. J., saying that "the opinion of almost the whole legal world is adverse to the reception of the testimony in question, and, in my opinion, on invincible foundations. (See, also, *Meade v. Smith*, 13 Conn., 346.)

The Supreme Court of Texas, in 1865, in *Johnson v. The State*, for murder, 27 Tex. R., p. 769, rejected the affidavit of three of the jurymen, saying that "no case has yet occurred in which such affidavits have been tolerated in the courts of this State for the purpose of impeaching a verdict. And when we consider the wide door which would thereby be opened for improper practices, we would hesitate long, and feel ourselves constrained by imperative necessity for accomplishing the ends of justice, before we could give our sanction to such a practice. Although a few isolated cases may be found in which such affidavits have been received, the better practice seems to have been established in most if not all the States except Tennessee. The question has been before this court heretofore, on more than one occasion, and it has been uniformly decided adversely to the appellant."

So, too, with the Supreme Court of New Jersey, (1872) in *Hutchinson v. ~~84~~ Co.*, 7 Vroom, 24, in which that court held that "although there are many cases to the contrary, the great weight of authority in this country and in England appears

to support the doctrine that the testimony of jurors to impeach their own verdicts should be excluded, on grounds of public policy."

So likewise, the Supreme Court of Oregon, in 3d Or. Rep., 180, used the following language: "The affidavit of the juror is inadmissible to impeach the verdict, or even to show a mistake in making up the verdict. Nor can it be received to show what passed in the jury room."

In *The State v. Stewart*, 9 Nevada, 121, (1874) there was a conviction of the crime of murder in the first degree, and in support of the motion for a new trial, the affidavit of one Collins, a juror, was presented. Hawley, J., in pronouncing the opinion of the court, said: "The affidavit of Collins presents no question worthy of consideration. No juror should ever be allowed to impeach the verdict of the jury by testifying to his *own misconduct*, or by asserting his ignorance of the law. These principles are now too well settled to require discussion, or citation of authorities."

In Indiana, according to Bicknell's Criminal Practice (edition of 1866), such affidavits are excluded by that Supreme Court. "It must be remembered," says that writer, page 238, "that the misconduct of the jury cannot be shown by the affidavit of a jurymen, 15 Ind., 347; 14 Ind., 450; 11 Ind., 368; and no statement of a jurymen, verbal or written, can be received to prove such misconduct. (10 Ind., 368.) But misconduct of the jury may be shown by the affidavit of their bailiff. (8 Bld., 32.)"

So in Illinois, in *Martin v. Ehrenfels*, 24 Ills., 187, it was held that the affidavit of a juror is not to be received to impeach the conduct of the panel. Said Caton, C. J., "we will first consider the affidavits of the jurors. The only tendency of these affidavits is to impeach the conduct of the jury. For this purpose the affidavit of a juror cannot be received." See, also, *Allison v. The People*, 45 Illinois R., 37.

The same Supreme Court, in 1871, in *City of Chicago v. Dermody*, 61 Ills., 431, held that "it is the well settled practice that, whilst the court will never receive affidavits of jurors to impeach their verdict, affidavits of jurors will be received to support their finding, when attacked."

In *Reaves v. Moody*, 15 Richardson, S. Car. Rep., 312, the question was as to the admissibility of an affidavit by four



of the jurymen, made three weeks after the trial, impeaching the verdict. The affidavit was rejected. In that opinion the Chief Justice said, "the precise point was adjudicated more than half a century ago. But the whole subject is elaborately discussed and the authorities reviewed in *Smith v. Culbertson*, 9 Rich., 108. It is difficult to add anything to what is there stated against the admissibility of such affidavits."

In Rhode Island, a new trial will not be allowed on jurors' affidavits, impeaching the verdict. (*Handy v. Prof. Ins. Co.*, 1 R. I., 400; *Tucker v. South Kingstown*, 5 R. I., 558.)

In Virginia, in Thompson's case, 8 Gratt., 641, 650, Thompson J., in delivering the opinion of the court, admitted the well settled English rule, and the great preponderance of American authority in the same way; and he quoted the strong language of Hosmer, C. J., in 5 Conn. R., 348.

In Bull's case, 14 Gratt., 613, 632, most of the authorities, English and American, including those of Virginia, on this subject, were referred to, and the Supreme Court of Appeals concluded that, "in view of all the authorities, and of the reason on which they are founded, we think, as a general rule, the testimony of jurors ought not to be received to impeach their verdict, *especially on the ground of misconduct*." See, also, *Reed v. Commonwealth*. 22 Grattan, 924, decided in 1872; 1 Green Cr. Law Rep., 267.

In *Cook v. Castner*, 9 Cush., 266, Chief Justice Shaw, in delivering judgment, said: "We think the Judge was right in rejecting evidence of the alleged partiality and misconduct of a juror in the jury room by the testimony of the juror himself or of the other jurors. It is a rule founded upon obvious considerations of public policy, and it is important, that it should be adhered to, and not broken in upon to afford relief in supposed hard cases." See, also, 97 Mass., 382.

And in *Underhill v. Van Cortland*, 2 Johns. Ch. cases, 348, 349, Chancellor Kent said as follows: "He is called as a witness to impeach his own award and his own integrity; and this case falls within the reason and policy of the rule of law that the affidavit of a juror is not to be received to impeach his verdict because it would expose jurors to dangerous practices, and to be tampered with by the losing party."

But as the main principles and features of our Codes are derived from New York sources, it will be pertinent to look more particularly into the decisions in that State. In *The People v. Carnal*, 1 Parker's Cr. Rep., 256, where there was a conviction of murder, it was held that "on a motion for a new trial on the ground of improper conduct of the jury, the affidavits of the jurors are not admissible to prove such improper conduct."

In *The People v. Hartung*, 17 How. Pr. Rep., 87, it is said that "no rule of law is better settled than that the evidence of jurors is not to be allowed for the purpose of impeaching or in any way impairing the effect of the verdict. The doctrine has long been established in England. It has been maintained with singular steadiness and unanimity in the United States, with the exception of Tennessee, where, following an early precedent, its courts have somewhat modified the rule."

In *Wilson v. The People*, 4 Park. Cr. Rep., 619, there was also a conviction of murder and a motion for a new trial. It was held that affidavits of jurors cannot be received to show that, at the request of one of their number, a constable handed in a paper on which were marked the several punishments fixed by law for the different degrees of manslaughter. The Court said that "the act was unquestionably an irregularity. It was an attempt to do what a jury has no legal right to do—to render a verdict based on the punishment, not on the truth." But the court, Gould, J., remarked as to the rule that jurors are not allowed to make affidavits to impeach their own verdicts, as follows: "And I know of no sounder rule of the law. Any other rule would permit a juror, whose conscience, bound by his oath, would not allow him to refuse his assent to a verdict, to commit or procure an irregularity that would, on his own affidavit thereof, avoid the verdict. It would open the door for such mischiefs as could not be endured."

The modern decisions in New York are not less emphatic. In *Dalrymple v. Williams et al.*, 63 N. Y. Rep., 363, (in 1875) Allen, J., in delivering the opinion, says: "There are reasons of public policy why jurors should not be heard to impeach their verdicts, whether by showing their mistakes or

their misconduct." "But the rule is well established, and at this day rests upon well understood reasons of public policy as connected with the administration of justice, that the court will not receive the affidavits of jurymen to prove *misconduct* on their part, or any act done by them which could tend to impeach or overthrow their verdict. This rule excludes affidavits to show mistake or error of the jurors in respect to the merits, or irregularity or misconduct, or that they mistook the effect of their verdict, and intended something different." See, also, to same purport, *Williams v. Montgomery*, 60 N. Y., 648.

The decisions of the Supreme Court of California are also justly considered in this Territory as of leading importance, because of the similarity of the Codes of that State to our own Codes. In *People v. Baker*, 1 Cal., 406, it was held in a trial for murder, that it is a settled rule, founded upon considerations of public policy, that the testimony of a jurymen cannot be received to defeat his own verdict.

In *Armsby v. Dickhouse*, 4 Cal., 103, the same rule was declared, and Murray, C. J., said: "The court below erred in setting aside the verdict of the jury and granting a new trial upon the affidavit of a juror of his own and his fellow juror's misconduct."

The same doctrine is reiterated in *Castro v. Gill*, 5 Cal., 40, and in *Wilson v. Berryman*, 5 *ibid* 45.

In *People v. Wyman*, 15 Cal., 70, (a case of manslaughter) it was held that a verdict cannot be impeached by an affidavit of a juror, tending to show that it was not a fair expression of the opinion of the jury.

The above rule was, however, changed by statute, passed March 5th, 1862, so far as to permit verdicts found "by a resort to chance," to be impeached by the affidavits of jurors. Their practice act, in relation to "new trials," section 193, subdivision 2, was amended so as to read as follows: "Misconduct of the jury:—And whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors. See *Donner v. Palmer*, 23 Cal., 47; also, Cal. Code of Civil Proc., (1872) § 657, (§ 193) page 170.

It is here noteworthy that our Code of Civ. Proc., § 286, sub. 2, is in precise agreement with the above provision in California.

The case of *Turner v. Tuolumne Co.*, 25 Cal., 398, is highly interesting because whilst it upholds the common law doctrine that such affidavits cannot be received to impeach but to support the verdict, it places a construction upon the amendment of 1862 as to what constitutes "a resort to chance." To the same effect is *Boyce v. The Cal. Slage Co.*, 25 Cal., 460-475, in which the old rule is reasserted, subject only to the legislative exception. The opinion of Sanderson, Ch. J., on pages 475-6-7-8, is worthy of attention.

*The People v. Hughes* (a case of arson), 29 Cal., 258, sustains the previous adjudications; as, also, does *Hoare v. Hindley*, 49 Cal., 275.

But a very pertinent case is *People v. Doyell*, 48 Cal., 85, an indictment for murder. The defendant moved for a new trial, and in support thereof, filed the affidavit of Frank Johnson, one of the jurors, stating, that while the jury were deliberating, defendant's character was being discussed, and that H. R. Perry, one of the jurors, stated that defendant was, to his knowledge, a quarrelsome man, and that he was at one time on a drunk at Downieville, and had his arms taken away from him. The affidavit also stated that W. E. Corbett, another of the jurors, left the jury room through a window, and remained absent eight or ten minutes unattended by the sheriff; and that the jury had with them the Penal Code, and read portions thereof relating to murder in the first and second degrees, and to manslaughter. The prosecution filed affidavits of Thomas Steel, a juror, and said Corbett, contradicting Johnson as to Corbett having left the jury room. The court below denied a new trial; and the Supreme Court, as to the affidavit of the juror, Johnson, alleging the aforesaid misconduct, held that "a juror is not disqualified to become a witness in a proper case. But public policy prohibits a juror from impeaching his own verdict by affidavit."

Counsel for the defendants, apart from Tennessee cases, mainly relied upon *Wright v. The Ills. Tel. Co.*, 20 Iowa, 195, decided in 1868, and subsequent cases in that State; upon *Perry v. Bailey*, 12 Kansas R., 539, (1874) and on *Farrar v. The State*, 2 Ohio St., 54, Newkirk's case in 27th Indiana, and *U. S. v. Reid*, 12 How., 361. c/

In Iowa, the earlier cases assert the doctrine as heretofore stated, although by the Code of 1851 it was provided that in applications for new trials the affidavits of jurors may be taken and used in relation to such application. *Cook et al v. Sypher*, 3rd Iowa, 484. In the Revision of 1860, that section of their Code was omitted ; but it, and the decisions upon it, seem to have brought about the Iowa doctrine announced in *Wright v. Ill. Co.*, in the 20th Iowa Reports. That modified rule is "that affidavits of jurors may be received for the purpose of avoiding a verdict,—to show any matter occurring during the trial, or in the jury-room, which does not essentially inhere in the verdict itself ; but that such affidavits to avoid the verdict, may not be received to show any matter which does essentially inhere in the verdict itself." See also *Fuller v. R. R. Co.*, 31 Iowa, 211 ; *Cowles v. R. R. Co.*, 32 Iowa, 515. *Perry v. Bailey*, 12 Kansas, follows and adopts this doctrine. But it is worthy of mention that the case of *Grinnell v. Phillips*, 1 Mass., [530, quoted in the 20th Iowa and 12th Kansas, has been overruled by a series of later decisions in Massachusetts.

In Ohio it has been held that where there is evidence *alibunde* of misconduct of the jury, their own testimony may be received, not only to limit and explain, but also to enlarge and aggravate such misconduct. *Farrder v. The State*, 2 Ohio St., 54. e/

I am aware, also, that Wharton, in commenting on the rule, expresses his views as to a modification "from necessity and when gross injustice has been wrought ;" but to support this view, in the cases quoted by him, his chief reliance seems to be upon the leading Iowa case, *supra*.

It is important to note, that, in the case in the 27th Indiana Reports, the misconduct, or irregularity, was not attempted to be shown by the affidavits of jurors. That would have been contrary to the rule previously declared in that State.

In *United States v. Reid*, 12 How., 361, the affidavits of two jurors, offered in support of a motion for a new trial, stated that during the trial they read a report of the evidence in a newspaper, but that it did not influence their verdict. Chief Justice Taney, in delivering judgment, abstained from laying down any general rule as to the reception of affidavits of

jurors, or examining the decisions upon the subject, because the court were of the opinion "that the facts proved by the jurors, if proved by unquestioned testimony, would be no ground for a new trial. There was nothing in the newspapers calculated to influence their decision, and both of them swore that those papers had not the slightest influence upon their verdict."

The Court did not decide, but expressly declined deciding, whether the affidavits were or were not admissible. If they were rejected, the verdict of course stood. If the facts stated in them should be assumed as proved, there was nothing in them to impeach the verdict; and this not merely because the jurors were not influenced, but also because there was nothing in the papers calculated to influence them.

From this review of the authorities here accessible, it cannot be doubted upon which scale the weight of authority rests. The sages of the common law, it is seen, utter no discordant or uncertain sounds. Our Codes, on the subject of new trials, exactly correspond with those now in force in California. The conclusion is irresistible that it is wisest to hearken to the voices of enlightened observation and experience, coming from so many quarters, and safest to follow the footsteps of such great legal luminaries as Mansfield, Kent, Shaw, and others whose names have been mentioned. The policy and reason of the rule in upholding verdicts, far outweigh the objections urged against it. A verdict, as the name imports, (*verdictum*) is taken in theory of law to be absolute truth, and it is important that it should be thus regarded. All communications among the jurors are confidential; they are intended to be secret, and it is best they should remain so. When a verdict is recorded, the jurors cease to act under their oaths, in their official capacity as part of the court, and as individual citizens, freed from the burden of their obligations and responsibilities, they should not afterwards be permitted to appear as simple witnesses to impeach or undo their solemn acts.

The affidavits of these two jurors, Messrs. English and Dale, are therefore inadmissible in this case, to prove the alleged misconduct or irregularity.

But even if the precedent in *U. S. v. Reid* should be followed and these affidavits examined, I am of the opinion that they would not, under the peculiar circumstances, show sufficient

ground for a new trial. By the Code of Criminal Procedure, § 423, the Court "has power to grant a new trial when a verdict has been rendered against the defendant by which his substantial rights have been prejudiced." And again in § 537 no error or mistake in any proceeding "renders it invalid, unless it has actually prejudiced the defendant, or tended to his prejudice in respect to a substantial right." By sub. 3, of section 423, a ground for a new trial is, when the jury have "been guilty of any misconduct, by which a fair and due consideration of the cause has been prevented."

The facts are, that on the 22nd of December, the case was given to the jury, and they then retired for deliberation, taking with them the written charge, which had been given by the Court. In the afternoon of the next day, Sunday the 23d, they sent to the judge a written request for further instructions; and afterward, in the presence of the parties and their counsel, they handed to the Judge, in open court, a paper, stating that they could not agree, and asking for answers to certain questions of law. The Judge declined to give further instructions at that time, for reasons written by him and read to the jury. In the forenoon of the next day, Monday the 24th, the jury were charged anew, in response to their request, from another written charge, in which the judge explained his former charge, and gave a further and thorough examination of the law of libel, as it exists in this Territory.

Now, on this branch of the subject the question arises: "What substantial rights of the defendants have been prejudiced by the alleged misconduct?" As stated in the motion and affidavits, the misconduct consisted in reading and examining the Statutes or Revised Codes of Dakota, and other works of law on the subject of libel, to-wit: on Sunday, December 23d, 1877.

In other words, the acts of misconduct took place the day before the second instructions were given. If so, what prejudice, or detriment to the defendants, could there be when on the following day, in open court, at their own request, they were fully and thoroughly instructed on the law of libel; and when, on the latter day, they might still have asked any and all further instruction they saw fit, on any point pertaining to the case.

That they were not governed, or did not deem themselves governed, by any private examination of the law, is obvious from the fact that, by their unanimous consent, they desired further information from the court itself. The fair and reasonable presumption therefore, is, that they took the law from the court as given on the 24th, and not from the books they had read on the 23rd.

When this motion was on argument I thought the circumstances unique and peculiar, and so stated. But on subsequent research, it was found that there are precedents where such misconduct arose before a second charge to the jury. The first one is *Hartung v. The People*, 4 Park, Crim. R., 329, a conviction of murder. It was before the Supreme Court, at Albany, on an exception to the refusal of the court of Oyer and Terminer to grant a new trial for alleged misconduct of the jury. The alleged misconduct consisted of several particulars. 1. That the jury, during their deliberations, improperly possessed themselves of a copy of the Revised Statutes, and consulted the same, in relation to the crimes of murder and manslaughter, (which fact was established by proof not coming from jurors.) 2. That in like manner they obtained and consulted a newspaper containing a report of part of the evidence; (this charge resting also, upon affidavit, *aliunde*.) 3. That the officers having the jury in charge, were present all or most of the time during their deliberations, (this charge, like the first, being on legal proof.) 4. That the verdict was rendered under the improper expectation that the prisoner would never be executed, (this, like the second exception, resting on affidavit *aliunde*.) 5. That the jury improperly sent a communication to the presiding judge without the knowledge of the accused or her counsel, or of the other members of the court. In delivering judgment, the supreme court, Hogeboom, J. said: "The application to set aside the verdict upon these grounds, was properly made to the court which tried the prisoner, and was refused by them, as to the second, fourth and fifth objections, upon the ground that they were unsupported by sufficient evidence, and unfounded in fact; and as to the first and third objections, that, no actual detriment ensued to the prisoner, inasmuch as though one or more of the officers were in the room, no im-



proper communication prejudicial to the prisoner took place between them and the jury ; and that although the jury did, at one period of their deliberations, examine portions of the Revised Statutes touching the offenses of murder and manslaughter, they subsequently appeared in court, and were specifically and imperatively instructed by the court as to the nature of those offenses and the discrimination between them. I do not deem it essential," continues the learned judge, "to travel over the entire evidence relied upon to establish the existence of these irregularities. I concur in the conclusions to which the court below arrived in regard to them on the questions of fact. This disposes of the second, fourth, and fifth objections, without the necessity of further remark. The first and third specifications were charges of mere irregularities, censurable ones it is true, but not resulting in any actual prejudice to the prisoner ; and I think we may safely dispose of them on that ground, expressing our concurrence in the views of the court below upon those points."

By reference to the original case in the Oyer and Terminer, (*People v. Hartung*, 17 How. Pr. 85) it will be seen that it was established by proof (other than that of jurors,) "that one of the jurors inquired of a constable who was in attendance, whether the jury could not bring in a verdict of manslaughter, stating at the same time, if they could do so, the whole jury would agree on such a verdict. The constable, in violation of his duty as well as his oath, undertook to give his opinion. He said he thought they could, but added that they had better consult their foreman, who being a justice of the peace, would probably know. The Revised Statutes were subsequently sent for by the jury, and their provisions in relation to the crimes of murder and manslaughter examined." The other charges of misconduct rested, said Harris, J., "upon the affidavit of the defendant's counsel who do not profess to have any knowledge on the subject themselves, but make their statements upon their information and belief. Nor do they give the sources of such information. From the character of the charges, however, it may be inferred that it was derived from some one or more of the jurors themselves. The constables who were in attendance upon the jury, have each so far as they could, denied the truth of these charges."

As to the exception that the jury improperly consulted a copy of the Revised Statutes, it was admitted that it was established by competent evidence ; and yet both courts denied the motion for a new trial. And why ? For the sole and manifest reason that, after the misconduct, they were again instructed by the court as to the nature of murder and manslaughter and the discrimination between them.

A second precedent is *Wilson v. The People*, 4 Park Cr. R., 632, also a case of murder. A new trial was asked on the affidavit of the constable that, at the request of a juror, he handed to that juror a paper on which were marked the punishments fixed by law for the different degrees of manslaughter. The affidavit showed that this paper was handed to the juror before the jury came into court for further instructions. This element of the case was particularly noticed by the court in denying the motion.

I come, finally, to consider the alleged error in the charge to the jury. Although the learned counsel for the defense were so requested by the court on the hearing, yet they declined to speak to, or argue this point. It was so far abandoned, that they passed it over in silence ; but they did not withdraw it. I speak with all possible courtesy when I say that, if there be error as alleged in the motion, it should have been pointed out, and argued, and urged before me ; so that, by the light of legal criticism and authority, I might have a fair opportunity of reviewing the question. The specification, however, stands thus mutely before me ; and I was bound, at my own toil and investigation, to ascertain whether or not error was committed. I have examined it carefully and in all its bearings, and, as at present advised, am unable to find any such error.

The specification consists in an isolated passage taken from the second charge to the jury. They were instructed to consider both charges together ; they were written and taken into the jury-room. But the sense and true meaning of a paragraph, or extract, cannot be obtained unless by reading it with the context. This is a canon of interpretation everywhere. The whole charge to a jury should be taken together ; and if without straining any portion of the language, it har-

monizes as a whole, and fairly and correctly presents the law bearing on the issues tried, the verdict will not be disturbed.

The jury were instructed in the very language of our Penal Code, that "every person who willfully, and with a malicious intent to injure another, publishes any libel, is guilty of a misdemeanor;" and that "an injurious publication is presumed to have been malicious, if no justifiable motive for making it is shown." And again, that "in all criminal prosecutions or indictments for libel, the truth may be given in evidence to the jury, and if it shall appear to the jury that the matter charged as libelous is true, and was published with good motives and for justifiable ends, the party shall be acquitted." And further, that "no reporter, editor, or proprietor of any newspaper, is liable to any prosecution for a fair and true report of any judicial, legislative, or other public official proceeding, or of any statement, speech, argument, or debate in the course of the same, except upon proof of malice in making such report, which shall in no case be implied from the mere fact of publication."

They were also instructed that "if the prosecution shows the falsity of the matter contained in the publication, malice is, *prima facie*, implied. The falsity, in other words, is *prima facie* evidence of malice; and proof of justification or excuse lies on the accused." Notwithstanding this, the question of malice, or "malicious intent," was left entirely to the jury in the following instruction, to-wit: "If you believe, beyond a reasonable doubt, that the article in question is not a fair and true report of public official proceedings—but unfair and untrue—and that the accusations contained in the article are false, it is for yourselves to say that there is the absence of that willfulness and malice essential to convicting persons for the publication of a libel. The misdemeanor in this case consists in publishing a libel willfully, and with a malicious intent to injure another. You must find each one of the elements of the offense, beyond a reasonable doubt; that there is a libel, that it was published by the defendants, willfully and with such malicious intent to injure John L. Pennington."

It is true as stated in the charge that the defendants did not produce a solitary witness before the jury; and that all the

evidence in the case was produced by the prosecution ; yet still the court was careful to state to the jury as follows :

“It is now for you to find what justifiable motives these defendants have shown to you. Whatever evidence of that nature, or of any kind for the defendants, you may find in the testimony of the prosecution, *must go in favor of the accused*. Examine it all. Weigh everything in evidence carefully.”

Now, under any fair view of all this, could the Court, consistently with its functions, have been any more particular in guarding the rights of the accused? Nowhere in the instructions did the Court intimate an opinion that the article was a libel. It simply defined that offense; and the jury were told that, in determining the law and the fact, they must dispassionately examine the publication.

In no part of the charges did the Court state an opinion that the publication was made willfully and with malicious intent to injure ; on the contrary, the whole question was left to the jury. It is quite true that the Court, in response to the jury, asking if they could return a verdict for defendants, if they believed the statements were untrue, did state the presumptions arising from the falsity of statements in a libelous article. This the Court could not avoid.

Malicious intent may generally be proved in two ways: either by proof, or presumption of law. The Penal Code itself so prescribes. It declares that the terms “malice” and “maliciously,” when applied to the intent with which an act is done, import a wish to vex, annoy or injure, another person, established either by proof or presumption of law.

The court was bound, therefore, to state any legal presumptions; and the more especially because the Code, under the head of libel, expressly enunciates that an injurious publication is *presumed* to have been malicious, if no justifiable motive for making it is shown. The main witness for the prosecution testified distinctly to the falsity of the statements, and by no witness of their own did the defendants attempt to show their truth, which would have been a justification, if with good motives. The whole evidence in the case coming, then, from the prosecution, what did the Court scrupulously

say to the jury? Why this: that whatever evidence of any kind for the defendants they might find in the testimony for the prosecution, *must* go in favor of the accused. They were also told in the clearest language possible that they *must find* each one of the elements of the offense, beyond a reasonable doubt: 1st, that there was a libel; 2d, that it was published by the defendants; 3d, that it was published willfully and with malicious intent; and 4th, to injure John L. Pennington, the person named in the indictment.

The privileges of editors and proprietors of newspapers were also fully set forth by the court, to-wit: that they are not liable to any prosecution for a fair and true report of any judicial, legislative or other public official proceedings, etc., except upon proof of malice, etc. And this entire question of privilege was squarely left to the jury. It was not and could not be pretended that the article in the defendants' newspaper had any relation to judicial or legislative proceedings; and it was left to the jury, without any intimation whatever from the court, to determine whether it fell within the meaning of "other public official proceedings." This was, certainly, very favorable to the defendants; for upon examination since, I have found a decision of the Court of Appeals of New York, giving construction to this portion of our statute, in which it is held that to apply the words "public official proceedings" to an executive act to be performed by a single official person, and which admits of no debate or deliberation, would be a perversion of the scope and meaning of this act." (*Sanford v. Bennett*, 24 N. Y., 26.)

And again in *Hunt v. Bennett* (of N. Y. Herald), 19 N. Y., 174, it was claimed that the alleged libel was the defendant's opinion of the plaintiff's character and qualifications as an officer, and that whether it was correct or not, the editor or proprietor had the right, in good faith, to express it. In that case, (under an almost identical statute), as in this case, it was asserted that the article was *privileged*. But what said the Court of Appeals? Just this, emphatically: "If the defendant's opinion of the plaintiff's character and qualifications as an *officer* had been contained in a remonstrance against his appointment to the office for which the defendant

asserted he was a candidate, and had been presented to the appointing power, without an unnecessary publication in a newspaper, as in this instance, of wide circulation, the point would have been well taken. As it is, he has been assailed through the columns of a public journal, as if he was a candidate for the suffrages of the people, and not of an appointing power, consisting of a few persons. It was not, therefore, a privileged publication."

Consequently, from these two decisions, this Court would have been justified in instructing the jury that, under our Code, the article in the defendants' newspaper was not privileged. Instead of doing so, this whole question, like the others, was left exclusively to the jury. It follows, also, that if not privileged, and not true, then the publication is legally presumed to have been malicious.

One other consideration, and I shall have finished this necessarily lengthy opinion. By our Code, on the trial of an indictment for libel, the jury have the right to determine the law and the fact. From this provision has sprung a misapprehension in the minds of some lawyers, tending to a belief that the Judge should not, in such a case, charge the jury at all, or, at least, that he was wrong in instructing them the second time. This is a grave misconception. Apart from our Code, the rule was so well settled that it became a maxim, that, "it is the office of a Judge to instruct the jury in points of law." Judge Cooley in his admirable work on Const. Lim., (page 463), states that, "wherever such provisions exist, the jury, we think, are the judges of the law; and the argument of counsel upon it is rightfully addressed to both the Court and the jury." "Nevertheless, we conceive it to be proper, and indeed the duty of the Judge to instruct the jury upon the law in these cases, and it is to be expected that they will generally adopt and follow his opinion."

While the jury are thus made judges of the law, as well as of the facts, still they are not, and cannot be, deprived of the right to ask the Court for information as to the law. They are chiefly laymen, taken from almost all the walks of life—are not versed in the law; and they have from time immemorial, by the common law, this inherent and constitutional

privilege. The trial by jury would not be preserved in its integrity, if the Legislative Assembly should undertake to deprive the jury of this ancient and essential right. It is a right so interwoven in the system of trials that it cannot be taken away without shattering the entire structure. For what is a jury trial? It is a trial of an accusation by twelve men lawfully chosen and sworn, in the presence, and under the direction of a Judge, learned in the law. Such Judge, in any trial, cannot refuse to give instructions when properly demanded of him. So to refuse would be to abdicate his official functions and duty—to deny to the jury a right demandable and obligatory, and to inflict the severest of blows upon the due administration of justice. It would, indeed, most properly subject the Judge to impeachment.

Consequently, our Code of Criminal Procedure, following carefully the common law, such as it was and is everywhere, expressly declares that in the first place, in charging the jury, the Court *must* state to them all matters of law which it thinks necessary for their information in giving their verdict. And, in the second place, without any exception whatever, that after the jury have retired for deliberation, if they desire to be informed on a point of law arising in the cause, they must require the officer to conduct them into court; and upon their being brought into court, the information required must be given.

In conclusion, I must be permitted to say, with all respect, that in all cases, but especially in one like this, the members of the bar (who are, to a certain extent, components of the court, and, as such, intimately connected with, and interested in, the due administration of the laws), should not allow erroneous views to be propagated, to the detriment of the tribunals, and of the law itself. The court cannot make, or unmake, laws. It must take them as they are, and not, as in some instances, it might wish them to be. A court must not deviate, one jot or one tittle, from the law as it is. If the law is bad, it is not for the judiciary, but for the people themselves, through their representatives in the Legislative Assembly, to change, modify or repeal it. In the instructions to the jury, I conscientiously, and without fear, favor or affection, laid down the law as I found it, and believed it to be. If in

discharging this high and solemn duty, I have erred, the remedy is plain and easy—not by appeals to popular notions or partisan feelings, but through the honorable channel of the Supreme Court.

The motion to set aside the verdict, and for a new trial, is denied.

By the Court:  
March 11th, 1878.

PETER C. SHANNON,  
Judge.

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#### PRACTICE.

##### SUMMONS. SERVICE OF, BY PUBLICATION.

Pre-requisites to obtain a valid order for the service of a summons by publication.

##### OPINION BY SHANNON, JUDGE.

The importance of complying with all the requirements of section 104 of the Code of Civil Procedure (Revised Codes, page 527,) in order to acquire jurisdiction, seems still to be overlooked, notwithstanding the rules of court, which were intended to be plain and perspicuous on the subject. This inadvertence is the cause of much trouble and labor to the Judge or Court, frequently involving the pains of an explanation of a statute upon which the decisions are numerous and explicit.

Aside from the well defined practice and expositions in New York, and other States, the attention of the profession is called to the case of *Rickelson v. Richardson*, 26 California Reports, page 149, which was an action to foreclose a mortgage, and in which that Supreme Court held that, as the sections, relative to publication are in derogation of the common law, they must be strictly pursued in order to give the court jurisdiction over the person of the defendant; and that a failure to comply with the rule prescribed, in any particular, is fatal where it is not cured by an appearance.

"An affidavit," said Sanderson, C. J., "which merely repeats the language or substance of the statute is not sufficient. Unavoidably the statute cannot go into details, but is



compelled to content itself with a statement of the ultimate facts which must be made to appear, leaving the detail to be supplied by the affidavit from the facts and circumstances of the particular case. Between the statute and the affidavit there is a relation which is analagous to that existing between a pleading and the evidence which supports it. The ultimate facts of the statute must be proved, so to speak, by the affidavit, by showing the probatory facts upon which each ultimate fact depends. These ultimate facts are conclusions drawn from the existence of other facts, to disclose which is the special office of the affidavit. To illustrate: "It is not sufficient to state generally, that, after due diligence, the defendant cannot be found within the State" (Territory,) "or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the acts constituting due diligence or the facts showing that he is a necessary party should be stated. To hold that a bald repetition of the statute is sufficient, is to strip the court or judge to whom the application is made of all judicial functions, and allow the party himself to determine, in his own way, the existence of jurisdictional facts, a practice too dangerous to the rights of defendants to admit of judicial toleration. The ultimate facts stated in the statute are to be found, so to speak, by the court or judge, from the probatory facts, stated in the affidavit, before the order for publication can be legally entered."

"Where this kind of service is sought, the proceedings should be carefully scrutinized and strict compliance with every condition of the law exacted, otherwise its provisions may lead to gross abuse, and the rights of person and property made to depend upon the elastic consciences of interested parties, rather than the enlightened judgment of a court or judge."

Under section 104 and rule IV of this district, what facts as to residence, must appear by the affidavit to satisfy the court or judge?

*First*—That the person on whom the service is to be made, cannot, after due diligence, be found within the Territory. Beside asserting this necessary averment in the affidavit, facts to show such diligence should be disclosed, or that, absolutely, at the time, the defendant is not within the Territory.

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*Secondly*—If his residence outside of the Territory is known, it must be stated so that the order may direct a copy of the summons and complaint to be forthwith deposited in the post-office, directed to him, at his place of residence.

*Thirdly*—If not known then the affidavit must state that such residence is neither known to the affiant, nor can with reasonable diligence be ascertained by him.

And the affidavit besides this necessary allegation, must state the facts as to such reasonable diligence in the enquiry after the residence, [rule IV.]

Furthermore, it must appear by the affidavit, to the satisfaction of the court or judge, that a cause of action exists against the defendant; or that he is a proper party to an action relating to real property in the Territory; and when so satisfied, by a properly drawn affidavit embracing all the requisites, an order may be granted that service be made by the publication of a summons in either of the cases specified in the five subdivisions of the section.

And in all cases where publication is made, the complaint must be first filed; and the summons, as published, must state the time and place of such filing. In addition to which statutory requirement, rules XXIV and XXV must be observed.

In *Ebertson v. Thomas*, 5 How. Pr. R., 45, the objection was that the affidavit was defective in not proving positively that the defendant had property in the State. Parker, J., held the affidavit defective in not showing that the defendant had property within the State, saying "it is not enough to state this on information and belief. That is no proof of the fact. A person may give such testimony who has no personal knowledge on the subject. Mere hearsay, and belief founded on it, are not evidence." The defendant must have property here, in the enumerated cases, or the court acquires no jurisdiction to make the order. If the court has no jurisdiction to make an order of publication, a judgment founded thereon is void, (*Fiske v. Anderson*, 33 Barb. 71.)

An affidavit which states that the defendant resides in another State, but that deponent is unable to state his present place of residence therein, is not sufficient, (*Cook v. Farren*, 34 Barb., 95; 21 How. Pr. R., 286.)

The order itself should be carefully prepared by the attorney who sends or presents it. The requisites of such order may be easily found in Abbott's Forms, or Estee's Pleadings and Forms.

This court will insist upon a strict compliance with all the above requisites; and it must be fully understood that an affidavit for the publication of a summons, is not of such insignificance that it may be framed at careless random, and in any such loose manner as has generally been the custom.

The defects in the present application are of a minor kind when compared with others which have come before me; yet they are sufficiently obvious to cause the order to be denied,

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APPLICATION FOR AN ORDER FOR PUBLICATION OF A SUMMONS.

C. A. SODERBERG, )  
                                   v. )  
 ANNE SODERBERG, )

This application must be refused. The jurisdiction thus sought to be acquired is strictly statutory, and can be acquired only in the mode prescribed by section 104 of the Code of Civil Procedure. The applicant must not only show that the case falls within some one of the five subdivisions of that section, but he must also establish the jurisdictional fact that the person on whom the service of the summons is to be made, cannot, after due diligence, be found within the Territory.

The circumstance that such person is a non-resident is of no importance, except as it tends to establish the other fact that he is not within the Territory at the time the application is made. In other words, the fact of the defendant's non-residence is not sufficient to authorize such an order; it must also appear that diligent effort, without avail, has been made to find the defendant within the Territory.

*Secondly*—Section 104, in relation to publication, points out what kind of proof shall be made to the satisfaction of the court or judge granting such order, that a party cannot, after due diligence, be found within the Territory. It must be made to appear by affidavit only. The return of a sheriff will not answer; that not being the kind of evidence required by section 104. Nor could the essential fact be made to appear

partly by affidavit and partly by a return. See *Peck v. Cook*, 41 Barb., 549; 27 Howard, 574; *Woffle v. Goble*, 53 Barb., 517. See, also, the opinion of SHANNON, J., as to the steps necessary to procure such order, published in "Daily Press and Dakotian" of January 29th, 1878. There is another objection. The Christian name of the plaintiff is not given. The law does not generally recognize a separate single letter as a name. In inserting the names of the parties in the summons, it is essential that the full true name of all the parties, plaintiff or defendant, should be given. (1 Wait's Prac., 469.)

By the true name is usually meant the first Christian name given the party in baptism and the sur-name of his ancestor. (20 N. Y. Rep., 355.)

The motion for the order is denied.

P. C. SHANNON,  
Judge.

MOTION FOR ORDER OF PUBLICATION UNDER SECTION 88, CODE OF CIVIL PROCEDURE.

WHALEY }  
v. }  
CARTER. }

The affidavit does not meet the requirements of the law. A proper one must show that the "person" sought to be made defendant, "cannot, after due diligence, be found within the Territory," and that his "residence is neither known to the affiant, nor can with *reasonable* diligence be ascertained by him."

I repeat, the law demands such *exact words* and *an oath to the truth of them*. Otherwise I have no power to order publication. The law is simple and plain, and must be followed. Apart from this, our rule of court also requires a statement of the particular facts tending to show what "*due and reasonable diligence*" has been used. For, swearing to a conclusion of law, is not sufficient. The "fact," or "facts," claimed as showing such "diligence," must "appear by affidavit to the satisfaction of the court or a judge thereof."

The affidavit states that the party has property in the Territory, as the affiant "is informed and believes." The averment of property must be *positive*, and not on information and belief.

By the affidavit it must "appear that such residence is *not known*." This one avers that his residence is in Iowa; and if there, why not employ *reasonable* diligence to ascertain the particular locality? It is a State contiguous to us, and the complainant with a little *earnest* exertion can doubtless find out his exact whereabouts. In New York, an affidavit which states that the defendant resides in another State, but that deponent is unable to state his present place of residence therein, is not sufficient; it should show that the residence of the defendant is unknown to deponent, and cannot, with reasonable diligence, be ascertained.

The provisions of the Code in relation to "service by publication" must be strictly complied with, in order to confer jurisdiction; and the *second* must show that the requirements of the statute have been followed. Moreover, there must be full compliance with the 4th, 21st, 24th and 25th rules of this court, as to all matters submitted within them. Application refused.

P. C. SHANNON,  
Judge.

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NAMES OF PARTIES IN PROCESS AND PROCEEDINGS.

W. M. HOYT AND C. WATROUS, former partners under the firm name of HOYT & Co., v. JACOB WILLIAMS, J. S. BENEDICT AND I. N. MARTIN.	}	<i>In the District Court of Lincoln County.</i>
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Motion to set aside the summons in said action as to defendants J. S. Benedict and I. N. Martin for irregularity in this, that the Christian names of each of the plaintiffs, and of the said Benedict and Martin, are not given in said summons.

The motion is solely founded on an alleged copy of the summons, indorsed by the sheriff that "this summons came to my hand this 18th day of February, 1878, and is a true copy of the original." There is no return of any service upon anybody. There is no affidavit of service upon which to support the motion or ground an order.

It is only from the time of the service of the summons, that the court is deemed to have acquired jurisdiction. Neither the court nor the judge has control of the proceedings until

legal service be shown. There is no legal proof even, that the alleged summons before me is a true copy. The sheriff's certificate is not competent. If the summons has been served on J. S. Benedict and I. N. Martin, why should they not adopt the usual course by making affidavits of the fact and disclosing their own Christian names, and by stating what protection of their rights they seek?

But the same irregularity of the plaintiffs thus sought to be remedied, the attorneys for this motion have likewise fallen into. They appear specially for J. S. Benedict and I. N. Martin. Asserting a rule, they violate it themselves. If it is essential that in all legal process and proceedings, the full, true names of all the parties should be given, how can these defendants, in invoking the principle, escape from its force and ignore its applicability as to themselves.

There is a further motion for an order to show cause, at chambers, why proceedings should not be stayed until the hearing and decision of the first motion at the next October term. There is nothing before me to support either motion, except as above stated. These papers are clearly insufficient, and there should be a proper affidavit. When the matter is legally presented, it will be time enough to consider what is a suitable remedy. Motions denied. PETER C. SHANNON,  
Judge.\*

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WARRANT OF ATTACHMENT.

Requisites of the warrant and of the affidavit therefor. Disjunctive and collective averments.

GEORGE CHAMBERLAIN } *In the District Court of Bon Homme*  
v. } *County.*  
SPARHAWK HUTCHINS. }

Motion to set aside the attachment in this action, and all proceedings taken by the plaintiff, or by the sheriff of Bon Homme county, etc. Under our Code of Civil Procedure, attachment is a remedy that has no existence independent of the action in which it is obtained. It is a provisional remedy.

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\*NOTE — Afterwards, in the same case, a similar motion to quash the summons—upon legal showing—was heard and determined by the same Judge, who denied the motion, maintaining that all such questions must properly be raised by answer.

in a civil action, arising first on contract for the recovery of money only, or in such other action as is prescribed by section 197.

A warrant of attachment must be obtained from the clerk of the court in which the action is brought; and such warrant must be attested in the name of the Judge, and must be sealed with the seal of the court. It can only issue upon affidavit, and such affidavit must state those facts necessary to confer jurisdiction. The seizure of a defendant's property before the plaintiff has established his right by a judgment, is a harsh proceeding, and to warrant it, a plain case should be made out, particularly as the *ex-parte* affidavit of the plaintiff is sufficient, if legally drawn, to support it.

To support the warrant, the affidavit must state what is required. (Section 199.) But great care must be taken here. It is ineffectual, if it be conglomerate. It must bring the case within *one* of the classes in which the Code allows an attachment. This is the general principle. If it is doubtful whether a defendant has departed from the Territory, or keeps himself concealed therein, with intent to defraud his creditors, an attachment may be granted if the plaintiff charge, in the disjunctive, that he has done one or the other. (*Van Alstyne v. Irwin*, 11 N. Y., Vol., 51.) For, as in case of departing debtors, a concealment with intent to defraud, or intent to avoid the service of summons, will justify the granting of the warrant.

What our Code has made essential to the acquirements of jurisdiction must not be omitted in the affidavit. This one is defective. It alleges "that the defendant is not now a resident of the Territory, but has left said Territory, and is about to move and is removing, or is trying to assign or secrete his property for the purpose of defeating and defrauding his creditors."

This is an obvious intent to embrace within the affidavit, all, or nearly all, of the classes, or subdivisions, enumerated in section 199. It alleges, for instance—a removing of property; but to what place? That the defendant has removed, or is about to remove, all of his property "from the Territory," is an essential ingredient, under subdivision 3 of section 199.

To remove alone, or to remove from one county to another, is not sufficient. The averment must be a removal or a purpose to do so, "from the Territory."

But this is not all the objections. This affidavit discloses no venue, although the entitling of an affidavit is not an indispensable part of it,—the Code of Civil Procedure, section 527, distinctly allowing the omission of it,—yet the better practice is to insert it.

The venue should be mentioned in every affidavit. It is one of the vital and essential parts of an affidavit, and it is *prima facie* evidence of the place where it was taken. In *Cook v. Staats*, 10 Barb., 407, it was held that an affidavit without a venue is a nullity, even though it be sworn to before an officer whose residence is mentioned in the jurat. The distinction between the title and the venue, is too plain to be discussed, and should be borne in mind by all practitioners. Of course, after the title, follows the venue, which states the county in which the affidavit is sworn to. (2 Barb. Ch. P., 601 Abbott's Forms; Tillinghast & Sh's Practice; Wait's Practice), etc.

The warrant of attachment does not comply with the requirements. It is not attached in the name of the Judge. (See § 197.) Again, it does not run in the Territory of Dakota. (See § 16, of Code of Civ. Proc.) It commands the sheriff in the name of the clerk, and of the attorney for the plaintiff. Moreover, it ignores the requisites of a warrant, as already set forth in section 201.

I do not now decide what, if any, of these last named defects may be amendable. For, although due notice of this motion has been given, yet no one appears in opposition, or asks for any privilege of amendment.

And now, July 21st, 1877, after hearing the Messrs. Gamble, for said motion—no one appearing against the same,—and on consideration: ordered, that the said motion be and the same is granted; and the said attachment, and all proceedings thereunder, are set aside at the costs of the plaintiff.

P. C. SHANNON,  
Judge.



## MINING RECORDS. EVIDENCE.

Competency and relevancy as evidence of mining records, and the custom among miners relating thereto.

JOHN FLAHERTY ET AL.,  
v.  
S. R. GWINN ET AL., } *In the District Court for Lawrence County.*

Defendants' counsel offered in evidence the record books of the Whitewood Quartz Mining District containing the record of the location of quartz mines since the organization of said district, in February, 1876, for the purpose of tending to show that there was, during a certain time, a custom among the miners of said district, established and in force, requiring such locations to be recorded, with the mining recorder of said district. To the introduction of this evidence the plaintiffs' counsel objected upon the ground of irrelevancy and incompetency.

## OPINION OF THE COURT.

Upon the question presented by the objection, while the argument of counsel has been able, and showed evidence of much research, my mind is not altogether clear as to its full scope and ultimate bearing, but I have come to a conclusion satisfactory to myself so far as it is properly before me. The Supreme Court of Nevada, in the case of *Golden Fleece Co. v. Cable Con. Co.*, 12 Nev., 312, seems to have settled very clearly and definitely some points under the U. S. Mining act of May, 1872. The court in the case, say: "Proof of a record is totally irrelevant without proof of some regulation making a record obligatory or giving it some effect."

Now there are more ways of proving a rule or regulation of miners, than by the act of the miners in their meetings or by a written record. Such rule or regulation may be established and shown to be in force by custom or usage. But the court in the case referred to further say: "The public law does not of itself create any such office as that of mining recorder. Neither does it make the recording of claims obligatory, or give to a record any effect. This is a matter left to the miners of the respective districts. If they make no rule requiring a record, none is required; if they give no effect to a record, evidence of a record is irrelevant." Regarding this, as I do, as a clear and correct statement of the

law, it seems clear that any rule or regulation established by miners, whether it be in writing or by verbal resolutions passed in their meetings, or by usage and custom, must be binding and obligatory, and if it provides for the recording of claims with the district recorder, it must make such recording obligatory, and not leave it to the option of the locator as a matter of convenience or precaution. In other words, it must be of a character, that if complied with will give to the party recording some right under it, and if neglected deprive him of some right that he would otherwise, or in the absence of the rule, obtain. In the case above cited the court again say: "The mining laws of the United States, R. S. sec's 2318 to 2346, recognize and sanction the custom long prevalent among the miners of this coast of organizing mining districts and adopting local laws or rules governing the location, recording and working of claims. Existing rules not in conflict with State or Federal legislation are ratified, and express authority is conferred upon miners in their several districts to adopt other rules, subject to certain specified restrictions. Miners are thus permitted to make rules in addition to those prescribed by Congress; but in order that mining claims may be held and the government title acquired, it is not essential that mining districts should be organized and local rules adopted. All that the government requires to be done, in order to obtain its title or license to occupy, is prescribed by law; and, in the absence of local rules, a compliance with the public law will secure the claim. The miners in their respective districts, may, if they choose, exact something more, but they are not obliged to do so, and no court, in the absence of proof, will presume that they have done so." Now, in order to deprive a party of the right to property which he is enabled to acquire by a compliance with the provisions of the statutes of the United States, by the imposition of any additional burdens or obligations imposed by rules and regulations of miners, such rules and regulations must be clear and positive in their character and requirements, and must not rest in inference or presumption; they must impose an obligation to do some certain and specific act, which if not complied with, will, by the terms of the rule deprive the locator of some right.

Where miners, in their experience deem some additional rule or regulation requisite, providing for some additional act thought necessary for the better protection of the miner and his rights in mining property, there is no doubt in my mind but that it is entirely competent for them to establish such rules and regulations (provided they are reasonable and do not conflict with Federal or Territorial legislation,) and attach penalties for their violation.

Now, if it was the custom of miners to record all claims located in the office of the mining recorder of the district, that fact is proper to be given in evidence as one act only, tending to prove a local rule or regulation, making the recording obligatory. What weight it may be entitled to, or just how far it may tend to establish such rule, is not now under consideration.

From an examination of the authorities, I am satisfied that the records offered in evidence are competent for the purpose of proving the custom of miners with reference to recording claims, and may be introduced for that purpose. Counsel has advised the court that they intend to follow it up with other evidence, tending to establish a rule making recording obligatory.

The objection is overruled.

GRANVILLE G. BENNETT,  
Presiding Judge.

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NOTE A.—In *Fraley v. Bentley et al.*, page 25, Chief Justice SHANNON dissented. He also dissented in the case of *City of Elk Point v. Vaughn*, page 113.



# RULES

OF THE

## SUPREME COURT.

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### RULE I.

The clerk of this court shall reside and keep his office at the seat of government, and he shall not practice as an attorney or counselor in this or any other court while he shall continue to be clerk of this court.

### RULE II.

He shall keep a complete record of all proceedings of the court, and shall perform all the duties pertaining to his office. He must not allow any written opinion of the court, or any original record or paper pertaining to his office, to be taken therefrom without an order from the court, or one of the judges thereof. He shall promptly announce, by letter, any decision rendered, to one of the attorneys of each side, when such attorneys are not in attendance upon the court.

### RULE III.

Before the papers in any case shall be filed, the party filing the same shall pay the clerk five dollars, to apply on his costs therein.

### RULE IV.

The notice of appeal shall be served in the manner provided in chapters 16 and 23 of the Code of Civil Procedure ; and if not served thirty days before the first day of the next succeeding term of the supreme court, the cause shall not be

then tried, unless, when there is a shorter service the respondent shall give the appellant, ten days before the term, notice that he will insist on a hearing at such term ; in which event the same shall be heard at such term, unless continued upon a sufficient showing or otherwise disposed of.

RULE V.

In civil actions or proceedings brought to this court on writ of error, the petitions shall be filed and citations issued and served upon the defendant in error, at least thirty days before the first day of the term. And if the petition is not filed and citation served for the length of time herein specified, the cause shall not be tried at such term, unless, when there is a shorter service, the defendant in error shall give to the plaintiff in error, ten days before the term, notice that he will insist on a hearing at such term, in which event the same shall be then heard, unless continued upon a sufficient showing or otherwise disposed of.

RULE VI.

In criminal causes, immediately after the issuing of the writ of error, a citation to the adverse party to be and appear at the supreme court, on a day and hour to be therein designated, shall be issued by the clerk of this court, and by him delivered or sent by mail to the plaintiff in error or his attorney, who shall cause the same to be served on such adverse party or his attorney at least ten days before such designated day.

RULE VII.

When a sufficient time intervenes, the citation provided for in the preceding rule, shall be made returnable on the first day of the next succeeding term, otherwise it shall be made returnable on some day during such term ; and writs of error in criminal causes may issue and citations be made returnable on any day during term time.

RULE VIII.

Writs of error and citations in criminal causes, may from time to time, upon the direction of one of the justices of this court, be made in blank by the clerk, signed by him and with

the seal of the court attached, and be placed in the hands of the clerks of the different district courts for use as they shall be required, and may be filled up and issued under the direction of the presiding judge of such district courts, upon the allowance of the writ of error by such judge.

## RULE IX.

When a writ of error is allowed and issued under the provisions of the preceding rule, it shall be the duty of the plaintiff in error forthwith to file with the clerk of this court, the petition in error, and a failure to do so shall be cause for dismissal of the writ ; and such petitions shall be filed by the clerk as of the day when the writ was allowed.

## RULE X.

When an appeal is taken, or a writ of error is sued out, it is the duty of the clerk of the court in which the judgment was rendered, or the order appealed from was made, without unnecessary delay, and within the time prescribed by the statutes, to make out a full and perfect transcript and copy of the notice of appeal, with proof of service thereof, and of the judgment roll ; or if the appeal is from an order or any part thereof, a complete copy of such notice of appeal and proof of service thereof, and of such order, and the papers upon which the order was granted, and embracing the certificate of the judge; or in criminal cases, a complete copy of the record and of all bills of exceptions, together with an assignment of errors and prayer for reversal, and embracing the certificate of the judge or justice of the supreme court, provided in section 483 of the Code of Criminal Procedure ; and to certify the same under his hand and seal of the court, and transmit the same to the clerk of this court. Which certificate shall be substantially in the following forms :

In civil cases as follows :

TERRITORY OF DAKOTA, }  
County of ....., } ss. .... Judicial District.

I, A. B., clerk of the district court within and for the said county of ..... in the ..... judicial district, of the Territory of Dakota, (or clerk of the United States district court for the ..... judicial district, Territory of Dakota)

do hereby certify, that the above and foregoing is a full, true, correct and complete transcript and copy of the notice of appeal and proof of service thereof; of the judgment roll, (or, of the notice of appeal with proof of service thereof, and of the order appealed from, and of all the papers and proceedings upon which such order was granted) and of the certificate of the judge in the above entitled action (or proceeding) wherein ..... is plaintiff and ..... is defendant, as the same now remains of record in the said court.

In witness whereof I have hereunto set my hand and affixed  
 [L.S.] the seal of said court this .... day of ....., A.  
 D., 18... ..  
 Clerk.

In criminal causes as follows :

TERRITORY OF DAKOTA, }  
 County of ....., } ss. .... Judicial District.

I, A. B., clerk of the district court within and for the said county of ....., in the .... judicial district of the Territory of Dakota, (or clerk of the United States district court for the .... judicial district, Territory of Dakota) do hereby certify and return in obedience to the annexed writ of error, that the above and foregoing is a full, true, correct and complete copy and transcript of the record of this action, to-wit : of the indictment, of the minutes of the plea, (or demurrer) and of the minutes of the trial; of the charges given and refused, and the indorsements thereon; and of the judgment, and also of all bills of exception, the assignment of errors and prayer for reversal, and of the certificate of the judge, in the foregoing entitled cause wherein the Territory of Dakota (or the United States) is plaintiff, and ..... is defendant, as the same now remains of record in said court.

In witness whereof I have hereunto set my hand and affixed  
 [L.S.] the seal of said court, this .... day of ....., A.  
 D., 18... ..  
 Clerk.

The prepayment of the fees for the rendition of the services of the clerk as provided in the foregoing rule, is regulated by sec. 32 of chapter 39 of the Political Code.



## RULE XI.

All criminal causes shall be placed first on the calendar in the order of the date of the filing of the petition, and shall have precedence of all other business, and shall be tried at the term at which the transcript is filed, unless continued or otherwise disposed of; and shall, if practicable, be decided at the same term, and the presence of the defendant in the supreme court shall in no case be necessary, unless specially ordered by the court.

## RULE XII.

All civil causes shall be placed on the calendar by the clerk in the order of the filing of the transcript, and shall (with the criminal cases) be numbered consecutively from term to term in one continued series; and no civil cause shall be placed on the calendar after the day preceding the opening of the court, unless ordered by the court.

## RULE XIII.

In civil action and proceedings the judgment-roll or record, in cases brought to this court, as certified by the clerk of the district court, must also embrace a certificate of the judge, or of a justice of the supreme court, as appended to the original judgment-roll, stating, in substance, that the foregoing papers, naming them, are contained in and constitute the judgment-roll and the whole of such judgment-roll.

## RULE XIV.

The judgment-roll mentioned in Rule X, as certified to in this court, must only contain the summons, the pleadings, the judgment, the verdict of the jury, or decision of the judge, the report of the referee, if any, the offer of the defendant, if any, the bill of exceptions, or case as settled and certified by the judge, and such other orders and papers as have been by the direction of the judge incorporated into and made a part of the judgment-roll, and which necessarily involve the merits and effect the judgment. Any bill of exceptions which contains matter not necessary to a determination of the errors complained of, or not containing the certificate prescribed by the statute and these rules, will be liable to be stricken out on motion or disregarded.

## RULE XV.

In making up the judgment-roll or records in all cases to be brought to this court, the parties, and the clerks of the district courts, must arrange the process, pleadings, orders and proceedings in the chronological order, provided in Rule XVII for the preparation of an abstract; and when the transcript is prepared for this court, it must be plainly written, carefully paged, and the lines on each page carefully numbered.

## RULE XVI.

In civil actions and proceedings, the appellant, or plaintiff in error, shall file with the clerk of this court, to be appended to the transcript, an assignment of errors, which assignment need follow no stated form, but must in a way as specific as the case will allow; point out the very errors objected to, and only such as he expects to rely on and ask this court to examine. Among several points in a demurrer, or in a motion, or in the instructions, or in other rulings excepted to, it must designate which is relied on as error, and the court will, in its discretion, only regard errors which are assigned with the requisite exactness. And in criminal causes the counsel for the plaintiff in error may also file a new assignment of errors in this court, specifically setting forth the very errors he desires to have reviewed, as in this rule provided.

## RULE XVII.

In all civil causes the appellant or plaintiff in error shall deliver or mail to the clerk of this court fifteen days before the first day of the term of the court at which the cause may be heard, ten printed copies of an abridgement or abstract of the record in the cause, setting forth so much thereof only as is necessary to a full understanding of all the questions presented to this court for decision. He shall at the same time also deliver a copy of the same to the counsel for the respondent or defendant in error, and if there be more than one respondent or defendant in error, to the counsel of each. The abstract shall be prepared and printed in substantially the following form:

## IN THE SUPREME COURT OF THE TERRITORY OF DAKOTA,

*June Term, 18...*

JOHN DOE, *appellant (or plaintiff) in error*,  
*v.*  
 RICHARD ROE, *respondent (or defendant) in error.* }

## COMPLAINT.

The plaintiff in his complaint states his cause of action as follows:

(Set out all the complaint necessary to an understanding of the questions to be presented to this court, and no more. In setting out exhibits, omit all merely formal irrelevant parts, as, for example, if the exhibit be a deed or mortgage and no question is raised as to the acknowledgment, omit the acknowledgment.)

When the defendant has appeared it is useless to encumber the record with the summons, or the return of the officer. Append to the abstract of each paper a reference to the page of the transcript on which it will be found.)

## DEMURRER.

To which complaint the defendant demurred, setting up the following grounds:

(State only the grounds of the demurrer, omitting all formal parts. If the pleading was a motion and the ruling thereon is one of the questions to be considered, set it out in the same way, and continue:)

And on the.....day of..... 18.., the same was submitted to the court, and the court made the following ruling thereon:

(Here set out the ruling. In every instance let the abstract be made in the chronological order of the events in the case—letting each ruling appear in the proper connection. If the defendant pleaded over, and thereby waived his right to appeal from these rulings, no mention of them should be made in the abstract, but it should continue:)

## ANSWER.

Which complaint the defendant answered, setting up the following defenses:

(Here set out the defenses, omitting all formal parts. If motions or demurrer were interposed to the pleading, proceed as directed with reference to the complaint.)

Frame the record so that it will properly present all questions to be reviewed and raised before issue is joined. When the transcript shows issue joined, proceed:)

On the.....day of.....18...,said cause was tried by a jury, (or the court, as the case may be) and on the trial the following proceedings were had:

(Set out so much of the bill of exceptions, or case, as is necessary to show the rulings of the court to which exceptions were taken during the progress of the trial; and if the evidence, or any part thereof, be embraced in the bill of exceptions, or case, epitomize the same with a reference to the page of the transcript on which the evidence in full may be found.)

#### INSTRUCTIONS.

At the proper time the plaintiff (or defendant, as the case may be) asked the court to give each of the following instructions to the jury:

(Set out the instructions referred to and continue:) which the court refused as to each instruction, to which several rulings the plaintiff (or defendant) at the proper time excepted, and thereupon the court gave the following instructions to the jury;

(Set out the instructions.)

To the giving of those numbered (give the numbers, if numbered or if not numbered), to the giving of the following portions thereof, (setting out the portions), and to the giving of each thereof, plaintiff (or defendant) at the proper time specifically excepted.

#### VERDICT.

On the.....day of....., 18..., the jury returned the following verdict into court:

(Set out the verdict.)

(If the cause is tried by the court, instead of the instructions and verdict of the jury, set out so much of the finding of fact and conclusions of law, and requests for findings, if any, together with the exceptions relating thereto, as may be necessary to present the errors complained of.)

#### MOTION FOR NEW TRIAL.

On the.....day of....., 18..., the plaintiff (or defendant) moved for a new trial upon the following grounds:

(Set out the grounds for the new trial.)

On the.....day of....., 18.., the court made the following rulings upon said motion:

(Set out the record of the ruling) to which the plaintiff (or defendant) at the proper time excepted.

## JUDGMENT.

On the.....day of....., 18.., the following judgment was entered:

(Set out the judgment entry (or order) appealed from.)

On the.....day of....., 18.., the plaintiff (or defendant) perfected an appeal to the supreme court of the Territory of Dakota by serving upon the defendant (or plaintiff as the case may be) and the clerk of the district court of..... county a notice of appeal, or caused a writ of error to issue.

(If supersedeas bond was filed state the fact.)

## ASSIGNMENT OF ERRORS.

And the appellant (or plaintiff in error as the case may be) herein says there is manifest error on the face of the record, in this:

(Set out the errors assigned.)

(To the abstract of each paper and entry append a reference to the page of the transcript on which it will be found.

This outline is presented for the purpose of indicating the character of the abstracts contemplated by the rule, which, like all the rules, is to be substantially complied with. Of course no formula could be laid down applicable to all cases. The rule to be observed in abstracting a case is: *Preserve everything material to the question to be decided, and omit everything else.*)

The abstract must be accompanied by a complete index of its contents, and must show where the papers and entries therein mentioned may be found in the transcript as well as in the abstract.

## RULE XVIII.

If the respondent, or defendant in error, shall deem the abstract of the appellant, or plaintiff in error, imperfect or unfair, he may within ten days after receiving the same, deliver to the counsel of the adverse party, one printed copy, and deliver or mail to the clerk of this court ten printed copies

of such further or additional abstracts as he shall deem necessary to a full understanding of the questions presented to this court for decision.

**RULE XIX.**

Not less than ten days before the first day of the term at which any civil cause may be heard, the counsel for the appellant, or plaintiff in error, shall serve upon the counsel of the adverse party one copy and shall deliver or mail to the clerk of this court ten copies of his brief; and not less than four days before the first day of such term the respondent or defendant in error shall serve upon the counsel of the adverse party one copy, and deliver or mail to the clerk of this court ten copies of his brief; which brief shall be printed and shall contain a statement of the points relied on and the authorities to be cited in support of the same.

**RULE XX.**

Rules 17, 18 and 19 are hereby made applicable as well to criminal causes, with the following exceptions and modifications: When because of the poverty of the defendant counsel has been assigned to his defense, and such defendant makes and files with the clerk of this court an affidavit stating in substance that he is financially unable to pay the expenses thereof, the printing of such abstracts and briefs may be dispensed with and only four copies each of the united abstracts and brief need be filed with the clerk. And in all criminal causes the abstracts must be served by plaintiff in error not less than ten days before the return day of the citation; and the amended abstract not less than three days before such return day; and the brief of the plaintiff in error must be served not less than six days before such return day, and the brief of the defendant in error not less than one day before such return day.

**RULE XXI.**

The manner of bringing on the argument in criminal causes, and the hearing thereof, are prescribed in sections 489, 490, 491 and 492 of the Code of Criminal Procedure.

**RULE XXII.**

Only two counsel shall be permitted to argue for each party in a cause, except in capital cases, and the court may limit

the time to be occupied by counsel for each side, before the argument shall commence; and any cause may be submitted on printed arguments or briefs.

## RULE XXIII.

The clerk shall distribute the printed abstracts and briefs required by these rules to be furnished him, as follows: One copy of each to each of the justices when the case is called for hearing: one copy of each to the reporter of the supreme court, and two copies of each to the Territorial library, and the remaining copies to be by him kept with the papers in the case. In criminal cases, when under rule 20, the printing of briefs and abstracts is dispensed with, the clerk shall deliver one copy of each to each of the justices, (one of which upon the determination of the case, will be returned to the clerk for the use of the reporter) and the remaining copy he shall retain with the papers in the case.

## RULE XXIV.

The time within which writs of error in civil actions and proceedings may be sued out, shall be limited as provided for taking appeals, contained in section 413 of the Code of Civil Procedure.

## RULE XXV.

All motions made or submitted to the court shall be in writing, accompanied by the affidavits or papers upon which the same are based, copies of which shall be served on the adverse attorney, and shall not be taken up until the day following the service thereof unless the cause is sooner reached for hearing.

## RULE XXVI.

Rehearings will be granted only upon the order of the court and under such rules as shall be prescribed in the particular case.

## RULE XXVII.

The opinion of the court in all questions reviewed on appeal or writ of error, as well as on such motions, collateral questions and points of practice, as the justices may deem of sufficient importance, shall be reduced to writing, and after having been delivered in open court, shall be filed with the

clerk, and no judgment shall be announced or entered until the delivery and filing of the opinions.

RULE XXVIII.

All dissenting opinions must be in writing, and may be filed in vacation, but must be within thirty days after the close of the term at which the cause was decided; and the records must in all cases, show whether a decision was made by a full bench, and whether either, and if so, which, of the justices dissented from the opinion.

RULE XXIX.

It shall be the duty of the clerk to insert the amount of the costs in the body of the mandate, procedendo, or other proper process remitted to the court below, and annex to the same the bill of items taxed in detail; but such mandate, procedendo or process shall not be remitted in civil causes until the costs in this court shall have been paid.

RULE XXX.

A failure to comply with any of the requirements contained in these rules within the times therein provided, will in the discretion of the court, be cause for dismissal of the appeal, or writ of error, or affirmance of the judgment, as the case may demand.

RULE XXXI.

The rule governing the admission of persons to practice as attorneys and counselors at law of this court are prescribed by Chapter 18 of the Political Code.



# INDEX.

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## ADMIRALTY.

1. **LIBEL: FILING: SEIZURE UNDER.** The libel must aver a seizure of the boat by an officer named in the statute for that purpose, before the same is filed.
2. **BOND: RECEIVING PROPERTY UNDER: WAIVER.** The claimant waived no right in regard to the defense set up by receiving the property on bond. To give the court jurisdiction the statute must be strictly followed. *United States v. Steamboat Cora, 1.*

## APPEAL.

1. **SHERIFF'S SALE: MOTION TO SET ASIDE: APPEAL.** No appeal lies from the judgment of the district court on a motion to set aside a sheriff's sale, that not being, within the meaning of the statute, a final order or judgment. *Bond v. Charleen & Lunn, 224.*
2. ——— : ——— : ———. The final order is made on motion to confirm the sale, and when a deed is ordered to be executed. Until such order be made the whole question as to the legality of the sale is open, and it may be controverted by all proper parties. *Id.*
3. **JUDGMENT: JUSTICE'S COURT.** An appeal to the district court from the judgment of a justice of the peace, under the provision of a statute requiring the trial to "proceed in all respects, in the same manner as though the action had been originally instituted therein," excludes the consideration of any alleged errors committed by the justice, on the trial, except such as relate solely to jurisdictional questions. *Bonesteel v. Gardner et al., 372.*
4. ——— : ———. The object of an appeal from the judgment of a justice, prior to the passage of the revised codes, was to try the case on its merits, and such an appeal was not designed to perform the functions of a *certiorari*. *Id.*

See PRACTICE 31, 32, 33, 34.

## ATTORNEYS.

1. **FEES.** A stipulation in a promissory note for the payment of a certain sum as attorney's fees if suit is commenced thereon, is valid, and may be enforced in an action on the note. *Farmers Bank v. Kemmick, 166*
2. ——— : **STIPULATION FOR.** A stipulation in a mortgage for the payment of reasonable attorney's fees in case suit is commenced thereon, is valid, and may be enforced in any action brought for the foreclosure of the mortgage. *Dunforth v. Charles et al., 285.*
3. ——— : ——— : **IN POWER OF SALE.** A stipulation in a power of sale attached to a mortgage for the payment of a sum certain as attorney's fees in case the mortgage is foreclosed by advertisement under such power, cannot be recovered in an action to foreclose. *Id.*

## COMMON CARRIER.

1. **RAILROAD COMPANY: LIABILITY.** A railroad company as a carrier of passengers, is bound, unless there is reasonable grounds for refusal, to take all persons who apply for passage, and their baggage, not exceeding the number of pounds prescribed by the rules of the company, and to take the same when offered for transportation by the accompanying passenger. *Waldron v. The C. & N. W. R. R. Co.*, 351.
2. ———: ———. Such company is responsible, when duly delivered and accepted, for the safe conveyance and delivery of such baggage and packages, to and at the point for which they are destined, unless prevented by an act of the public enemy, by act of law, or by an irresistible superhuman cause. *Id.*
3. ———: ———. If property is offered with the passenger, but not so packed as to assume the outward appearance of ordinary baggage, or so as to deceive or conceal its true character, it is within the scope of the agent's business and duty to decide whether the company will receive and carry it as baggage, and if so received to be forwarded, the company is liable. *Id.*
4. ———: **AGENT: DELIVERY.** A delivery to a duly authorized agent of a common carrier, who is in the habit of receiving packages, is a sufficient delivery. *Id.*
5. ———: ———: ———. Where the defense is that a delivery was made to an agent of the owner, or consignee, it must be clearly proved that the person to whom the goods were delivered as agent was duly authorized as such. The carrier is under as much obligation to deliver property to the right person as he is to deliver it in a reasonable time and at the proper place. *Id.*
6. ———: ———: ———. If the delivery by a carrier be to the wrong person, although it be entirely by mistake, or by gross imposition, or upon a forged order, the carrier will nevertheless be responsible for the value of the goods lost. *Id.*

## CONTRACT.

1. **VALIDITY: MUTUALITY.** To make a contract valid the minds of the parties thereto should meet. *Waldron v. Evans*, 11.
2. **BREACH: MEASURE OF DAMAGES.** F sold and conveyed to A and B, a certain parcel or tract of timber land, for the consideration of four hundred dollars expressed in the deed, and the further consideration of one hundred dollars to be paid in lumber; and that the said A and B would erect on said land, within a certain stated time, a good steam saw-mill. A and B failed to erect the mill as stipulated: *Held*, that the benefit to be derived by F was the difference between the price actually paid, and the value of the land, that being the amount paid by F for the promise of A and B to erect the mill. *Fraley v. Bentley et al.*, 25.
3. **RECIPROCAL CHARACTER: CONSTRUCTION.** A contract should not be so construed as to destroy its reciprocal character, or leave its enforcement to the option of one party, to the damage and detriment of the other. *Cheatham v. Wilber et al.*, 335.
4. **IRRESISTIBLE SUPERHUMAN CAUSE: IN WHAT IT CONSISTS.** The words "irresistible superhuman cause," are equivalent to, and are used in the same sense as "act of God," and consists in natural necessity, as wind and storms which arise from natural causes, and which operate without any aid or interference from man, and is distinct from inevitable accident. *Cuy County v. Simonsen et al.*, 403.
5. ———: **ACCIDENTAL FIRE: EXCUSE.** Accidental fire, not caused by lightning, is not an irresistible superhuman cause, and will not excuse from the performance of an obligation, unless especially so stipulated, or when the party is bound only to the exercise of reasonable care and diligence. *Id.*

CONVEYANCE.

1. **UNRECORDED DEED: NOTICE.** Actual notice of a prior unrecorded conveyance, or of any title, legal or equitable, to the premises, or knowledge and notice of any facts which should put a prudent man upon inquiry, impeaches the good faith of the subsequent purchaser. *Gress v. Evans et al.*, 387.
2. ———: ———. There should be proof of actual notice of prior title, or prior equities, or circumstances tending to prove such prior rights, which affect the conscience of the subsequent purchaser. *Id.*
3. ———: ———. Actual notice, of itself, impeaches the subsequent conveyance. Proof of circumstances, short of actual notice, which should put a prudent man upon inquiry, authorizes the court, or jury, to infer and find actual notice. *Id.*
4. ———: ———. Notice is either actual or constructive. Actual notice consists in express information of a fact. Constructive notice is notice imputed by the law to a person not having actual notice; and every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, and omits to make such inquiry with reasonable diligence, is deemed to have constructive notice of the fact itself. *Id.*
5. **PURCHASER: GOOD FAITH.** Good faith consists in an honest intention to abstain from taking any unconscientious advantage of another, even through the forms or technicalities of the law, together with an observance of all information or belief of facts which would render the transaction unconscientious. *Id.*

CRIMINAL LAW.

1. **INDICTMENT: SURPLUSAGE.** A count in an indictment charging an assault with intent to kill and to murder, although the statute does not use the words "with intent to murder:" *Held*, good, the words *and to murder* being mere surplusage, and therefore immaterial. *The People v. Odell*, 197.
2. ———: **SEVERAL COUNTS: SUFFICIENCY.** Where an indictment contains several counts, if one is good, and sufficient to sustain the judgment, it will not be reversed or set aside on the ground that there is a count that is bad. *Id.*
3. **ASSAULT WITH INTENT TO KILL: DIVISIBLE.** The crime of assault or assault and battery with intent to kill is divisible into degrees, and the defendant may be convicted of the offense charged or of any lesser offense necessarily embraced therein. *Id.*
4. ———: ———: **PROOF.** It is enough to prove so much of the indictment as shows that the defendant has committed a substantial crime therein specified, or one that is necessarily included in, and forms a constituent element of the higher offense charged. *Id.*
5. **INTOXICATION: EVIDENCE OF: WHEN ADMISSIBLE.** Where an offense is divisible into degrees, evidence of intoxication is admissible for the purpose of enabling the jury to determine the purpose-motive or intent with which the act was committed. *Id.*
6. ———: **DEGREE: WHEN A DEFENSE.** Intoxication may not under any circumstances be regarded as a defense, excuse or justification for the commission of crime, unless in case of a person who performs an act under such a state of intoxication as to be unaccompanied by volition, when he has lost control of his will, and is incapable of forming a purpose. *Id.*
7. **DEADLY WEAPON: USE OF: PRESUMPTION.** There being, under the provisions of the penal code, felonious assaults by the use of deadly weapons, other than assault with intent to kill: *Held*, erroneous to instruct the jury that "where an assault or assault and battery is made with a deadly weapon, there is a presumption of an intent to take life, and can only be rebutted by proof that it was excusable or justifiable. *Id.*

8. **GAMBLING: COMMON GAMBLER: INDICTABLE.** The keeping of a common gambling house is indictable at common law, and a person, who for gambling purposes, keeps or exhibits any gambling tables, establishment, device or apparatus, is deemed a common gambler, and punishable as for a misdemeanor under the statutes of this territory. *The People v. Sponsler*, 289.
9. **FORMER CONVICTION OR ACQUITTAL.** Where a defendant enters a plea of former conviction or acquittal, he elects to stand on such plea; and if the issue is found against him, he will not be permitted to enter a plea of not guilty, but the court must give judgment of conviction or acquittal according as the facts prove or fail to prove the former conviction or acquittal. *The People v. Briggs*, 302.
10. ——. A plea of former conviction or acquittal may be pleaded either with or without the plea of not guilty; and if the defendant does not desire to stand on his plea of former conviction or acquittal, he must unite therewith his plea of not guilty. *Id.*
11. **STATUTE: PENALTY: APPLICATION.** One section of the statute regulating the sale of intoxicating liquors, provides that "for every violation of the provisions of the first and second sections of this act, every person so offending shall forfeit and pay a fine," etc: *Held*, that a person is liable to prosecution and punishment for the violation of either section. *And* and *or* are convertible as the sense of the statute may require, and this rule applies to criminal statutes. *The People v. Sweetser*, 308.
12. **PERSONS JOINTLY INDICTED: JUDGMENT.** Two or more persons may be jointly indicted for the sale of intoxicating liquors without license, when jointly engaged in the business, and if convicted the judgment must be several against each for the whole penalty. *Id.*
13. **INDICTMENT: COPY TO ACCUSED: WAIVER.** A person indicted under the laws of the United States for any other capital offense than treason is entitled to the privilege of having delivered to him a copy of the indictment and list of jurors and witnesses, at least two entire days before trial: *Held*, that the entry of a plea of not guilty and proceeding to trial by defendant is a waiver of the statutory privilege, and cures the objection that no copy of indictment was furnished or that the copy served was defective. *McCall v. The United States*, 320.
14. **INDICTMENT: DEGREES OF CRIME: CONVICTION.** On an indictment charging an assault, or assault and battery with intent to kill, the defendant may be convicted either of the crime charged, or of an assault, or assault and battery with intent to do bodily harm, or for assault and battery, or for a simple assault. *The Territory v. Conrad*, 363.
15. ——. An assault with intent to do bodily harm and without justifiable or excusable cause, is not a felony under the statute, nor was it at common law. *Id.*
16. ——. **VERDICT: JUDGMENT.** A verdict on an indictment for "an assault upon and for shooting one F. McM. with a pistol, commonly known as a revolver, loaded with gun powder and leaden bullets, with intent to kill," finding "the defendant guilty of assault with intent to do bodily harm, and without justifiable or excusable cause," is a conviction for a misdemeanor, and will not sustain a judgment as for a felony. *Id.*
17. **SENTENCE: ILLEGALITY: CORRECTION.** Where the only error complained of is the illegality of the sentence, the supreme court has the power to affirm the conviction, modify the judgment, and remit the case to the court below that the proper judgment may there be imposed. *Id.*
18. **HOUSE OF ILL FAME: REPUTATION: EVIDENCE OF.** Under an indictment charging defendant with keeping a bawdy house or house of ill-fame, evidence tending to show the general reputation or character of the house kept by defendant is admissible. *The Territory v. Chartrand*, 379.

19. — : — : —. The prosecution must first show that the defendant kept the house in question, and may then show its general character or reputation, and that of its frequenters and of the defendant; and if this satisfies the jury that the house was of the kind described in the statute, and indictment, they may so find, without proof of particular acts of prostitution or lewdness, *Id.*
20. — : INDICTMENT: HOW SUSTAINED. The charge may be sustained if the evidence satisfies the jury beyond all reasonable doubt that the defendant kept the house and then that it was resorted to by people of both sexes, who were reputed to be of bad and lascivious character, and that it was generally understood and reputed to be such house of ill-fame. *Id.*

### DAMAGES.

1. MEASURE OF DAMAGES. F sold and conveyed to A and B a certain parcel or tract of timber land for the consideration of \$400, expressed in the deed, and the further consideration of \$100, to be paid in lumber; and that the said A and B would erect on said land, within a certain time, a good steam saw-mill. A and B failed to erect the mill as stipulated: *Held*, that the benefit to be derived by F was the difference between the price actually paid and the value of the land, that being the amount paid by F for the promise of A and B to erect the mill. *Fraleigh v. Bentley et al.*, 25.
2. MITIGATION. The rule as to what may be shown in mitigation of actual damages sustained in actions of trespass, should be limited to evidence of actual benefit received by the plaintiff, after the trespass, from the property taken. *Clark et al. v. Bates et al.*, 42.
3. —. If after the property has been taken in trespass from the owner, an execution against him is levied thereon and the property sold, and a judgment against the owner thereby satisfied, this may be shown in mitigation of damages, and the law will presume the assent of the owner to such application of the property as is for his benefit, to the extent of such benefit. *Id.*
4. —. Where the verdict is only for actual damages sustained after deducting all benefits derived by the plaintiff from the return of some portion of the goods, it is incompetent to show in mitigation of damages that after the trespass was committed, and before the goods were returned, they were in the custody of the law, under and by virtue of process, for the purpose of enabling the jury to deduct from the aggregate damages, the damages done the goods while in such custody. *Id.*
5. PERSONAL PROPERTY: ACTION TO RECOVER. The jury, in the trial of an action for the recovery of specific personal property, may give the plaintiff not only actual damages for the detention, but if the defendant has been guilty of fraud, malice or oppression, may also award exemplary damages for the sake of example, and by way of punishing the defendant. *Holt v. Van Eps*, 206.
6. CHOSES IN ACTION: CONVERSION: MEASURE OF DAMAGES. The legal presumption is that choses in action are worth the amount of principal and interest indicated on the face of the instrument at the time of conversion, and that amount with legal interest thence to the trial is *prima facie* the measure of damages. *Id.*
7. — : PRESUMPTION OF VALUE: HOW REBUTTED. It is incumbent on defendant to show in reduction of damages the fact of payment in whole or in part; the inability of the maker to pay wholly or partially; a release of the maker from his undertaking; the invalidity of the instrument, or other matters which would legitimately affect or diminish its value. *Id.*

### DEED.

1. DEED: CONSIDERATION. The recitals in a deed as to the consideration, are not conclusive, but the true and actual consideration may be shown by proof *aliunde*. *Fraleigh v. Bentley et al.*, 25.

## EQUITABLE JURISDICTION.

1. **COURTS OF EQUITY: POWERS: JURISDICTION.** Courts of equity do not sit to reverse or correct errors and mistakes of law, and cannot attempt to prevent, any more than it will redress, all wrongs. *Frost et al. v. Flick*, 131.
2. ———: ———. Equity will not interfere by injunction to restrain the enforcement of tax proceedings on the ground of irregularities in the assessment of the tax, or in the execution of the power conferred upon taxing officers. *Id.*
3. **OFFICERS: OFFICIAL DUTIES: NEGLECT.** The neglect by a county officer of his official duty, cannot be made the grounds of a proceeding in chancery by a private citizen, unless damaged, by such action, or thereby deprived of some substantial right. *Id.*
4. **TAX: ILLEGALITY: COLLECTION WHEN RESTRAINED.** Courts of equity will interfere by injunction to restrain the collection of a tax, when it is illegal or unauthorized, or when the property assessed is not subject to the tax, or where fraud has been practiced by the taxing officers. *Id.*
5. ———: ———: ———. Before an injunction will issue to restrain the collector of a tax, it must clearly appear that the tax is not such an indebtedness as the duty of the citizen, defined and regulated by law, requires him to discharge. *Id.*
6. ———: ———: ———. In no case will the collection of a tax be enjoined where it is not shown that the injury resulting from its enforcement would be irreparable, and this fact must appear in the bill by issuable averments. *Id.*
7. **TAXATION: OBJECTS AND PURPOSES: IRREGULARITIES.** The object of taxation is the raising of revenue for governmental purposes; if the same end is accomplished, even though the proceedings may be irregular, that would have been reached had all the forms of the law been strictly complied with, equity cannot be invoked to undo, or restrain from the doing of, that which it was the object and purpose of the law to accomplish. *Id.*
8. ———: **LEVY AND COLLECTION: LEGAL PROCEEDINGS.** The levy and collection of taxes are legal proceedings under the statute, for the purpose of apportioning and enforcing a recognized obligation due the public, and can no more be interfered with or regulated by courts of equity, than can proceedings at law upon private claims. *Id.*
9. **HABEAS CORPUS: WRIT WHEN GRANTED: JURISDICTION.** The supreme and district courts of this territory possess common law as well as chancery jurisdiction; and the said courts and the respective judges thereof may grant writs of habeas corpus in all cases, and in similar manner, in which they are granted by the federal courts and judges. *United States, ex rel Scott, v. Burdick, U. S. Marshal*, 142.
10. **CONTRACT: ILLEGAL: EQUITABLE RELIEF.** E and C, under a contract with the board of county commissioners, erected for the county a court house building; no proceedings were instituted to prevent the execution of the contract, or to restrain the issuance of warrants for work done until the building was completed, and accepted by the board: *Held*, that before any action could be maintained by or on behalf of tax payers for equitable relief on the grounds of the illegality of the contract, there should be restored to the contractors what they had expended in labor, money and material. *Wood et al. v. Bangs et al.*, 179.
11. **LEGAL REMEDY: WHEN PURSUED.** Where a statute confers upon public officials, authority to do an act, and the same statute points out the remedy to any party aggrieved, such party must pursue his legal remedy, and will not be granted relief in a court of equity. *Id.*
12. ———: ———: ———. Where by statutory provision a party aggrieved has an appeal to the district court from any decision of the board of county commissioners upon any matter properly before them, such legal remedy must be pursued, and equitable relief cannot be invoked. *Id.*

EVIDENCE.

1. **BOOKS: HOW INTRODUCED.** Books of parties may be corroborative as evidence, or not, but the effect is left to the jury from inspection in connection with other evidence in the case. A party is not bound to introduce his book; the opposite party may introduce it, at any rate if there be no objections. *Waldron v. Evans*, 11.
2. **ADMISSION: COMPETENT EVIDENCE: WEIGHT.** An admission of a party is evidence against him according to its terms and the circumstances under which it is made; but it is not the best evidence. The best evidence is what *actually* transpired between the parties. *Id.*
3. **DEPOSITIONS.** Defendant, by waiving objections to the blending of equitable and legal proceedings in one action, thereby consents that evidence may be received in any of the modes applicable, and the cause may be heard on depositions. *Friley v. Bentley et al.*, 25.
4. **IMPROPER: EFFECT.** The appellate court will not inquire whether the improper evidence received, did in fact prejudice the objecting party, but whether it could reasonably and properly have been so understood by the jury as to prejudice him. *Tankton County v. Rosstenschier*, 125.
5. ———: **NEW TRIAL.** Where it is apparent that the jury may have fairly and reasonably understood the improper evidence, in a way to injuriously prejudice the party objecting, a new trial must be granted. *Id.*
6. **HUSBAND AND WIFE: CO-PLAINTIFF: COMPETENT WITNESSES.** Under the provisions of the code of civil procedure, husband and wife, when joined as co-plaintiffs or co-defendants, are competent witnesses to testify in their own behalf, and the fact that the evidence of one may incidentally benefit the other, is no valid objection. *Sanders et al. v. Reister*, 151.
7. ———: ———: ———. The rule that permits husband and wife, when joined, to testify in their own behalf, cannot be extended to authorize or permit one to testify against the other, excepted in cases provided by statute. *Id.*
8. **EXPRESSION OF PAIN: INJURY.** Wherever the bodily or mental feelings of an individual, are material to be proved, in case of injury, the usual expressions of such feelings, pain and suffering, are original and competent evidence. *Id.*
9. ———: ———. The common complaints of pain and distress, as the natural concomitants of illness and physical injury, are regarded as verbal acts, and proof of them is as competent as any other testimony when relevant to the issue. *Id.*
10. **BEST OR HIGHEST: REASON OF RULE.** The principle of the rule requiring the best or highest evidence, is founded on the presumption that there is something in the better evidence which is withheld, adverse to the party resorting to inferior or secondary evidence. *McCall v. The United States*, 320.
11. ———: **EFFECT OF THE RULE.** The general effect of the rule is to prevent fraud, and to induce parties to bring before juries the kind of evidence least calculated to mislead or perplex them. The reason of the rule limits the extent of its application; consequently it does not operate where the law itself obviates the presumption of fraud which would otherwise arise.  
  
*Application of the rule:* In general to prove that a person is a public officer, it is sufficient to show that he is acting as such. So where a document is of a public nature, a copy is sometimes admitted, for the production of the original is dispensed with on account of the inconvenience resulting from the frequent removal of such papers; and therefore, the absence of the original affords no presumption of fraud. *Id.*
12. **HEARSAY: ADMISSIBILITY.** The admissibility of hearsay on questions of public right, is so well established upon authority, that its competency is not

disputed, however widely courts may differ upon its force and effect. Where the question is as to territorial limits, and where the boundary concerns the extent of a public municipal jurisdiction, either public reputation, or the particular declarations of deceased persons, made *ante litem motam*, are receivable. *Id.*

13. **PUBLIC DOCUMENTS: OFFICIAL PUBLICATIONS.** All publications of state papers, maps, charts, and public documents, when such publications are by authority of congress, are as valid evidence as the originals from which they were copied, and may be introduced and read as evidence on mere inspection. *Id.*
14. **MAPS: GROUNDS OF ADMISSION.** Maps stating boundaries are receivable in evidence, provided it appears that they have been made by persons having adequate knowledge. And in cases where they have been admitted, their admissibility has depended on the ground of their being *public documents*, or upon the other ground of their being in the nature of admissions. *Id.*
15. **WRITTEN: EXCEPTIONS.** To the general rule that when written evidence of a fact exists, all parol evidence is excluded, there are exceptions, such as that written acknowledgments and receipts need not be produced or their absence accounted for to admit parol evidence of the transaction which they are designed to evince. *Bonessteel v. Gardner et al*, 372.
16. ———: ———. A bill of parcels, receipted, of the sale of articles of personal property, need not be produced to prove a sale; parol evidence is competent on the ground that such paper generally amounts to nothing more than a receipt for the price. *Id.*
17. ———: **WHEN INDISPENSIBLE.** Whenever it turns out that a writing exists with regard to a transaction, which the law regards as the best evidence, it must be produced or its absence accounted for. A bill of sale being the best evidence of title, is properly admissible in evidence. *Id.*
18. **HOUSE OF ILL-FAME: REPUTATION.** Under an indictment charging defendant with keeping a bawdy house or house of ill-fame, evidence tending to show the general reputation or character of the house kept by defendant is admissible. *The Territory v. Chartrand*, 379.

#### FINES, PENALTIES AND FORFEITURES.

1. **PROCEEDS: APPROPRIATION.** It is within the power of the territorial legislature to provide that all fines, penalties and forfeitures for any criminal offense committed within an incorporated city, shall, when collected, be paid into the city treasury of such city, to the credit of the board of education, a body corporate created by special charter, to control the public schools within such city. *County of Tunkton v. Faulk*, 348.

#### HABEAS CORPUS.

1. **JURISDICTION: RES ADJUDICATA.** Under the habeas corpus act, district courts have original, concurrent jurisdiction with the supreme court, and their judgments are subject to review as in other cases. *Ex parte James Scott*, 140.
2. ———: ———. After the writ has once been sued out before the supreme or district court, or a judge thereof, and an adjudication had thereon, the principle of *res adjudicata* is applicable, and until that judgment is reversed, the facts and conditions remaining the same, a writ subsequently issued must be abated. *Id.*
3. **WRIT WHEN GRANTED: JURISDICTION.** The supreme and district courts of this territory possess common law as well as chancery jurisdiction; and the said courts and the respective judges thereof may grant writs of habeas corpus in all cases, and in similar manner, in which they are granted by the federal courts and judges. *United States, ex rel Scott, v. Burdick, U. S. Marshal*, 142.



4. ———: ———. The writ may be granted as well in cases where the petitioner is restrained of his liberty for an alleged crime against a law confined in its operation to the territory—whether enacted by congress or the territorial legislature—as against an act of Congress applicable to the whole of the United States. *Id.*
5. **ADJUDICATION: APPEAL.** From an adjudication by the district court or a judge thereof on a petition for writ of habeas corpus, an appeal lies to the supreme court of the territory.

## HIGHWAYS.

1. **EXCAVATIONS: PROTECTION.** A person opening near a public way a deep and dangerous excavation, is bound to place some guard or protection around it, if it is sufficiently near such public way to make it probable that persons traveling thereon might be injured. And whether the excavation is deep and dangerous, and in dangerous proximity to the public way, are questions for the jury. *Sanders et al. v. Reister*, 151.
2. ———: ———. The obstructions or nuisances need not be directly in the road—it is enough if they are so close to it as to make traveling thereon dangerous; and the true and proper test of legal liability is whether the excavation be substantially adjoining the way. *Id.*

## INDIAN COUNTRY.

1. **INDIAN COUNTRY: PURPOSE AND EFFECT OF NON-INTERCOURSE ACT OF 1834.** The purpose and effect of the non-intercourse act of 1834, was to declare and proclaim what was then Indian country; country in which the manners, customs and laws of the Indian tribes prevailed, and in which the United States should protect them in all their natural and guaranteed rights, and not to declare or maintain that to be Indian country, which was not in fact in the occupation and under the control of the Indians. *Clark et al. v. Bates et al.*, 42.
2. ———: **CEDED: RIGHT OF OCCUPATION.** The policy of all branches of the government, from the earliest times, has been to protect all citizens in the occupation of ceded Indian country, and to secure cessions as fast as demanded by the increase of our own population, and when territory has once been solemnly ceded by the Indians, it has never afterwards been considered or treated as Indian country for any purpose. *Id.*
3. ———: **EFFECT OF CESSION BY TREATY.** Cessions by treaty, duly proclaimed by the president, have always been considered and treated by the people of the United States, as an invitation from the executive department to all people to come, open and possess the ceded country. *Id.*
4. ———: **EFFECT OF TREATY OF 1868.** The non-intercourse act of 1834, wherein it fixed and determined the limits of the Indian country, was modified and changed by the treaty with the Dakota nation of Indians, made in 1868, as it has been by various other preceding treaties. *Id.*

## INDICTMENT.

1. **INDICTMENT: SUFFICIENCY.** Two counts in an indictment, one for giving away and the other for selling spirituous liquors, do not render it bad for the reason that the jury return a general verdict of guilty. *Bruguier v. The United States*, 5.
2. ———: **MATERIAL ALLEGATIONS: PROOF.** Every allegation that is essential must be proved as laid, unless stated under a *videlicet*; the office of which is to mark that the party does not undertake to prove the precise circumstances alleged. *Id.*
3. ———: ———: ———. The allegation of time, place, quality, kind, and value, when not descriptive of the identity of the subject of the action, will be found immaterial, and may not be proved strictly as alleged. It is sufficient if the proof agree with the allegation in its substance and general character, without precise conformity in every particular. *Id.*

4. ———: ———: ———. An indictment describing a thing by its general term, is supported by proof of a species which is clearly comprehended within such description. If the indictment charges that the defendant sold, to-wit: one pint of whisky, it is sustained, if it be proved that he sold or gave to the Indian spirituous liquors. *Id.*
5. SURPLUSAGE. A count in an indictment charging an assault with intent to kill and murder, although the statute does not use the words "with intent to murder:" *Held*, good, the words *and to murder* being mere surplusage, and therefore immaterial. *The People v. Odell*, 197.
6. SEVERAL COUNTS: SUFFICIENCY. Where an indictment contains several counts, if one is good, and sufficient to sustain the judgment, it will not be reversed or set aside on the ground that there is a count that is bad *Id.*
7. SALE OF INTOXICATING LIQUORS: INDICTMENT: SUFFICIENCY. An indictment which charges the defendant with unlawfully and knowingly selling intoxicating liquors, to be drank in and upon the premises where sold, without having obtained a license and given bond as required by law: *Held*, sufficient, and that it is not necessary to describe the premises where, the person to whom, or the particular kind or quantity of liquor, sold. *The People v. Sweetser*, 308.
8. ———: ———: JUDGMENT. Two or more persons may be jointly indicted for the sale of intoxicating liquors without license, when jointly engaged in the business, and if convicted the judgment must be several against each for the whole penalty. *Id.*
9. CONSTITUENT ELEMENTS: RIGHTS OF ACCUSED. In criminal cases, prosecuted under the laws of the United States the accused has the right "to be informed of the nature and cause of the accusation against him," and the indictment must set forth the offense with clearness and all necessary certainty to apprise the accused of the crime with which he stands charged. *McCall v. The United States*, 320.
10. OBJECTS OF: CERTAINTY. The object of the indictment is, first, to furnish the accused with such a description of the charge against him as will enable him to make his defense, and avail himself of his conviction or acquittal for protection against a further prosecution for the same cause; and second, to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had. *Id.*

### INJUNCTION.

1. WHEN GRANTED: RULE. An injunction will not be granted to restrain the doing of an act which is unlawful and irregular, unless substantial and positive injury will result from a refusal to grant the writ. *Wood et al. v. Bangs et al.*, 179.
2. ———: ———. An injunction will never be granted when it will be productive of hardship, oppression or injustice, or public or private mischief. *Id.*
3. ———: ———. The granting or refusing an injunction rests in the sound discretion of the court, and will never be granted when the benefits secured by it to one party is of but little importance, while it will operate oppressively, and to the great annoyance and injury of the other party; unless the wrong complained of is so wanton and unprovoked in its character, as properly to deprive the wrong doer of the benefit of any consideration as to its injurious consequences. *Id.*

### INSTRUCTIONS.

1. SABBATH. A jury that has retired to deliberate upon their verdict, may request and receive additional instructions on the Sabbath, or the judge may on that day, upon his own motion, have the jury brought in and reinstruct them, for the purpose of correcting a supposed error or mistake in his former charge. *The People v. Odell*, 197.

2. **HOW CONSIDERED.** An appellate court in determining the question of error in giving or refusing instructions, examine and pass upon the instructions as a whole and not in fragmentary parts, and from such examination determine whether the jury may have been misled, or the defendant prejudiced. *The Territory v. Chartrand*, 379.

See PRACTICE, 19, 20.

### INTOXICATING LIQUORS.

1. **SALE TO INDIANS.** The selling or giving spirituous liquors to an Indian under the charge of an Indian agent, under the statutes of the United States, is a misdemeanor, not a felony. *Bruguier v The United States*, 5.
2. **—: JURISDICTION.** The sale of intoxicating liquors to an Indian in charge of an Indian agent, except by an Indian in the Indian country, is an offense against the laws of the United States, for the trial and punishment of which the federal courts alone have jurisdiction. *United States, ex rel Scott, v. Burdick*, 142.
3. **—: LOCUS IN QUO.** The offense is the same, and the jurisdiction is unchanged, whether the liquor is sold to such Indian in the Indian country, on a reservation, or in some place within the exclusive jurisdiction of the United States, or without the boundaries of either. *Id.*
4. **PERSONS JOINTLY INDICTED: JUDGMENT.** Two or more persons may be jointly indicted for the sale of intoxicating liquors without license, when jointly engaged in the business, and if convicted the judgment must be several against each for the whole penalty. *The People v. Sweetser*, 308.

### JUDGMENT.

1. **FINDINGS OF FACT.** Where a judge, in a cause tried to the court, fails to find on all the material issues, it is such error as will invalidate any judgment rendered therein. *Dole v. Burleigh*, 227.

### JURISDICTION.

1. **JUSTICES OF THE PEACE: POWER OF LEGISLATURE.** The legislature of the territory has no power under the constitution of the United States, or the organic act, to confer upon justices of the peace jurisdiction to try and punish offenses which are infamous or indictable at the common law. *The People v. Sponsler*, 289.
2. **DISTRICT COURT: PROCEEDINGS IN JUSTICE'S COURT.** In cases of concurrent jurisdiction, after an indictment has been found and presented, the district court cannot be ousted of jurisdiction by any proceedings subsequently commenced in a justice's court, resulting in the conviction or acquittal of the party indicted, on the same charge. *The People v. Briggs*, 302.
3. **INDIAN RESERVATION: HOMICIDE.** A trial for homicide committed on an Indian reservation must be had on the federal side of a territorial court, and is governed by the United States statutes and the rules of the common law. *McCall v. The United States*, 320.
4. **HOW ACQUIRED: PROVISIONAL REMEDY.** A court can acquire a limited jurisdiction in an action by the allowance of a provisional remedy; but jurisdiction does not become complete until the service of a summons in some of the modes prescribed by law, or by the voluntary appearance of the defendant. *Waldron v. The C. & N. W. R. R. Co.*, 351.
5. **VOLUNTARY APPEARANCE.** A voluntary appearance by the defendant is equivalent to personal service of the summons upon him; and after such appearance the court acquires full jurisdiction for all purposes whatsoever. *Id.*

6. **GENERAL APPEARANCE: ENTRY BY DEFENDANT.** A voluntary appearance by the defendant to the suit generally, is equivalent to personal service of the summons upon him; and after such appearance the court acquires full jurisdiction for all purposes whatsoever. *Bonesteel v. Gardner et al.*, 372.
7. ———: ———. If the proceedings under the writ for obtaining possession of personal property were so defective or irregular, that no jurisdiction could thereby be conferred, all questions in relation thereto become immaterial after defendant appears, answers and contests the case on its merits. *Id.*

SEE PRACTICE, 29, 30.

### JURY.

1. **GRAND JUROR: CHALLENGE: WHEN INTERPOSED.** Under a provision of the statute giving to a person held to answer a charge for a public offense, the right to challenge any individual grand juror, before the jury retires, after being sworn and charged, it is error in the court not to allow the challenge to be made as a matter of right, although no reason is shown why it was not interposed before. *The People v. Wintermute*, 63.
2. ———: ———: **DISQUALIFICATION.** When a legal challenge is properly made to an individual grand juror, and the court refuses to entertain or consider such challenge, the juror against whom the same is made is disqualified, and his presence on the jury vitiates the whole panel. *Id.*
3. ———: ———: **RIGHT OF CHALLENGE.** The refusal by the court to grant a challenge, legally interposed to a grand juror takes from the party entitled to interpose the same, one of the greatest safeguards guaranteed by law, deprives him of a substantial right, and vitiates all the proceedings. *Id.*

### JUSTICES OF THE PEACE.

1. **JURISDICTION.** The legislature of the territory has no power under the constitution of the United States, or the organic act, to confer upon justices of the peace jurisdiction to try and punish offenses which are infamous or indictable at the common law. *The People v. Sponsler*, 289.
2. ———: In cases of concurrent jurisdiction, after an indictment has been found and presented, the district court cannot be ousted of jurisdiction by any proceedings subsequently commenced in a justice's court, resulting in the conviction or acquittal of the party indicted, on the same charge. *The People v. Briggs*, 302.
3. **HOW CHOSEN: ILLEGAL APPOINTMENT.** A justice of the peace must be elected by the people in such manner as may be provided by law; and where the office of city justice is filled by appointment of the city council, such appointment is illegal and void, and clothes the appointee with no judicial power or authority to act. *Id.*

### MISJOINDER.

SEE PRACTICE, 2, 3, 4.

### LEGISLATURE.

1. **SOURCE OF POWER.** The territorial legislature is a creature of congress; its powers, duties and sessions are defined and limited by the act organizing the territory, and the amendments thereto, and it derives no life or power from any other source. *Treadway v. Schnauber et al.*, 236.
2. **EXTRA SESSION.** The territorial legislature is authorized to hold a biennial session of not to exceed forty days, and there is no provision empowering any one to call, or the members to meet in extra session, or to extend the session beyond the time specified. *Id.*

3. ———: **ACTS NULL AND VOID.** The biennial session of the territorial legislature had convened, remained in session during the limit of forty days and adjourned. The members subsequently convened in a so-called extra session, and passed an act authorizing counties and townships to vote aid to railroad companies: *Held*, that the so-called extra session was unauthorized and illegal, and all its acts and proceedings null and void. *Id.*
4. **JUSTICES OF THE PEACE: JURISDICTION: POWER OF LEGISLATURE.** The legislature of the territory has no power under the constitution of the United States, or the organic act, to confer upon justices of the peace jurisdiction to try and punish offenses which are infamous or indictable at the common law. *The People v. Sponsler*, 289.

# MUNICIPAL CORPORATIONS.

1. **POWER TO CREATE: CONGRESSIONAL RESTRICTIONS.** The act of congress, approved March 2d, 1867, which provides that the legislative assemblies of the several territories shall not grant private charters or especial privileges, has no application to municipal corporations. *City of Elk Point v. Vaughn*, 113.
2. ———: ———: ———. The City of Elk Point is a public corporation, and the term "especial privileges" refers to the granting of monopolies, such as ferries, trade marks, the exclusive right to manufacture certain articles, or carry on certain business in a particular locality to the exclusion of others. And the granting of a public charter does not confer any especial privilege within the meaning of that act. *Id.*
3. **POWERS.** The authority to pass by-laws and to regulate the internal affairs and policy of a municipal corporation are incident to its existence. *Id.*
4. **ORGANIZATION: VALIDITY.** The validity of a corporate organization cannot be questioned in a prosecution for the violation of one of its ordinances. Evidence that the corporation is acting as such is all that is required. *Id.*
5. **INTOXICATING LIQUORS: SALE: POWER TO LICENSE.** In the absence of controlling general legislation respecting the sale of intoxicating liquors, it is competent for cities and towns to require a corporate license of persons who may desire to sell such liquors, and to punish persons selling without license. The powers exercised by municipal corporations are superadded to those exercised by the territory in the same locality. *Id.*
6. **ORDINANCE: VALIDITY.** To render the whole ordinance void, the good and bad parts must be essentially and inseparably connected in substance. If omitting the void part, that which remains is complete in itself and capable of being executed, it must be sustained. *Id.*
7. ———: ———. The validity of an ordinance is a question for the court, and evidence tending to show that the amount of the license is unreasonable, should be excluded from the jury. *Id.*
8. **DISCRETIONARY POWERS: ABUSE.** Municipal corporations are clothed with large discretionary powers in relation to police matters, and courts will not interfere with the exercise of these powers, except in clear cases of abuse. *Id.*
9. **COUNTY LICENSE: SALE UNDER: DEFENSE.** County license is no bar to a prosecution for the violation of a city ordinance punishing the sale of intoxicating liquors without a city license, and such county license was properly excluded when offered in evidence on the trial. The sale of intoxicating liquors without a county license is a separate and distinct offense. *Id.*
10. **INTOXICATING LIQUORS: SALE ON THE SABBATH: PUNISHMENT.** The sale of intoxicating liquors on the Sabbath without a city license, is a violation of an ordinance requiring such license, for which the offender may be prosecuted, notwithstanding the same act may be a violation of the territorial law, and the party be liable to punishment thereunder. *Id.*

11. **POWERS: DOUBT CONSTRUED.** A municipal corporation possesses, and can exercise, the following powers and none others:
  1. Those granted in express words.
  2. Those necessarily implied, or necessarily incident to, the powers expressly granted.
  3. Those absolutely essential to the declared objects and purposes of the corporation—not simply convenient, but indispensable.
 And any fair doubt as to the existence of a power is resolved, by the court, against the corporation and the existence of the power. *Treadway v. Schnauber et. al.*, 236.
12. **AGENTS AND OFFICERS: POWERS AND DUTIES.** Agents and officers of a municipal corporation cannot bind the corporation by any act which transcends their lawful or legitimate powers. And this rule applies to the issue of negotiable, as well as unnegotiable, evidences of debt. *Id.*
13. — : —. The duties and powers of the officers of a municipal corporation are prescribed by statute, and every person dealing with them as such, may know, and is charged with the knowledge of, the nature of their duties and extent of their powers. *Id.*
14. — : —. There is a broad distinction to be observed between an *irregular exercise of granted power*, and the *total absence or want of power*. *Id.*
15. **COUNTY: CHARACTER: PURPOSES.** A county is strictly a political corporation—a granted power to a designated portion of the people, to aid and arrange the machinery of government of the whole state or territory. It is not designed for pecuniary profit, nor has it any powers but such as pertain to its strict municipal and public character. *Id.*
16. **MUNICIPAL BONDS: COMMISSIONERS: RATIFICATION.** The county possessing no power to vote aid to a railroad company, commissioners could not bind the county by issuing what purports to be its bonds; and the county having no authority, originally, to authorize their issuance, it could not ratify the act after it was done. Such bonds are therefore void, even in the hands of an innocent holder, and the collection of tax levied to pay the interest thereon should be perpetually enjoined. *Id.*

#### NEGLIGENCE.

1. **TRESPASS: DAMAGES.** The mere fact that the plaintiff, when she suffered the injury, was technically trespassing on the defendant's land, does not deprive her of all remedy for defendant's negligence, if her trespass did not involve negligence on her own part contributing to her injury. *Sanders et al. v. Reister*, 151.
2. **HIGHWAY: EXCAVATIONS: PROTECTION.** A person opening near a public way a deep and dangerous excavation, is bound to place some guard or protection around it, if it is sufficiently near such public way to make it probable that persons traveling thereon might be injured. And whether the excavation is deep and dangerous, and in dangerous proximity to the public way, are questions for the jury. *Id.*
3. — : — : —. The obstructions or nuisances need not be directly in the road—it is enough if they are so close to it as to make traveling thereon dangerous; and the true and proper test of legal liability is whether the excavation be substantially adjoining the way. *Id.*
4. **CONTRIBUTORY: ONUS PROBANDI.** Negligence on part of plaintiff is a mere matter of defense to be established affirmatively by the defendant, by a preponderance of the evidence, though it may be inferred from the circumstances proved by the plaintiff. *Id.*
5. — : —. The plaintiff may establish the negligence of the defendant, his own injury in consequence thereof, and his case is made out; if there are circumstances that convict him of concurring negligence, the defendant must prove them and thus defeat the action. *Id.*

NEW TRIAL.

1. **EVIDENCE: IMPROPER: EFFECT.** The appellate court will not inquire whether the improper evidence received, did in fact prejudice the objecting party, but whether it could reasonably and properly have been so understood by the jury as to prejudice him. *Tankton County v. Rosseuscher*, 125.
2. ———: ———: **NEW TRIAL.** Where it is apparent that the jury may have fairly and reasonably understood the improper evidence, in a way to injuriously prejudice the party objecting, a new trial must be granted. *Id.*

PLEADING.

1. **DENIAL: SUFFICIENCY.** The answer denies each and every material allegation in the complaint "in manner and form as therein set forth." *Held*, not a denial of the allegations of the complaint, and is clearly frivolous: *Argu*, the words "in manner and form as therein set forth," qualify the preceding language, so that the denial only refers to the manner and form in which the plaintiff has stated his cause of action, and not to the substance of the allegation in the plaintiff's complaint. *Dole v. Burleigh*, 227.
2. **UNDER THE CODE: ADMISSIONS.** The object of the code is to compel the defendant to admit every part of the plaintiff's complaint which he cannot conscientiously deny: *Held*, that any fact sustaining the plaintiff's case admitted in one part of the answer is to be taken as true, and the plaintiff is not bound to prove it. *Id.*
3. **FORMER CONVICTION OR ACQUITTAL.** A plea of former conviction or acquittal may be pleaded either with or without the plea of not guilty; and if the defendant does not desire to stand on his plea of former conviction or acquittal, he must enter therewith his plea of not guilty. *The People v. Briggs*, 302.
4. **COMPLAINT: ESSENTIAL AVERMENTS.** The words "facts constituting a cause of action," as used in the code of civil procedure, mean those facts which the evidence upon the trial will prove, and not the evidence which will be required to prove the existence of the facts. *Clay County v. Simonsen et al.*, 403.
5. ———: ———. Every fact which the plaintiff must prove, to enable him to maintain his suit, and which the defendant has a right to controvert in his answer, must be distinctly averred and set forth according to their legal effects and operation, and not the evidence of those facts, nor arguments, nor inferences, nor matters of law only. *Id.*

PRACTICE.

1. **PLEADINGS: MOTION: EFFECT OF.** When a motion to set aside the affidavit and requisition in an action of replevin has been made and sustained, with leave to the party to amend, the proceedings are concluded, and the case ended, so far as a general judgment is concerned, unless the amendment is made pursuant to the order of the court. *Campbell v. Case*, 17.
2. **MISJOINDER OF ACTIONS: OBJECTION, HOW TAKEN.** Objections on the ground of misjoinder of actions, should be taken by demurrer, motion to strike out, or motion to compel plaintiff to elect upon which cause of action he would proceed. *Fraley v. Bentley et al.*, 25.
3. ———: ———: **WAIVER OF OBJECTIONS.** The objection is waived by taking issue upon plaintiff's petition, and such waiver extends to all defects in the first pleading, except such as are of a jurisdictional character, and that the complaint or petition does not state facts sufficient to constitute a cause of action. *Id.*
4. ———: ———: **STIPULATION BY WAIVER.** Such waiver is to be taken as a stipulation or agreement that defendant is content with the plaintiff's pleadings, and takes issue upon them as presented. *Id.*

5. **APPEARANCE: WAIVER.** After a cause has been heard in the supreme court, and remanded for a new trial, the general appearance entered by appellee or defendant in error, in the court below, and submitting to its jurisdiction, by having a trial on the merits, without any objection, is a waiver of any error which might have been committed in the transmission of the decision of the supreme to the district court. *Bentley et al., v. Fraley*, 38.
6. **FORMS OF PROCEDURE: DAMAGES.** While under the old practice a portion of the damages only might have been proved and recovered in an action *vi et armis*, and another portion only in an action of *trespass on the case*, under the code all may be shown and recovered under the complaint stating the simple facts. *Clark et al. v. Bates*, 42.
7. ———: ———. All distinctions in old forms having been abolished, all damages may be recovered in one action, that flows from the original trespass, and the original trespasser must respond to the extent of the damages. *Id.*
8. **ACTION: PARTIES: JOINDER.** Two or more persons cannot for themselves, and on behalf of other tax-payers of the county, be joined in an action to restrain the proper officers from paying county warrants, alleged to have been issued without authority of law, and to have them adjudged illegal and cancelled. *Wood et al. v. Bangs et al.*, 179.
9. ———: ———: ———. Money for the payment of county warrants can only be raised by taxation, and such taxation must effect the property of all tax-payers alike, and persons having no common right or common interest in the property taxed cannot join in an action to restrain its levy or collection: *Argu*, the tax is upon and against the individual property of each tax-payer, and that if there is any injury, it is an injury to the property and rights of each tax-payer alone, and not an injury affecting a common right or interest. *Id.*
10. **NONSUIT: WHEN DENIED: RIGHTS OF PLAINTIFF.** A peremptory nonsuit cannot, in this territory, be ordered against the will of the plaintiff. He has a right by law to a trial by jury, and to have the case submitted to them. He may agree to a nonsuit, but if he does not so choose, the court cannot compel him to submit to it. *Holt v. Van Eps*, 206.
11. **ERROR OF RECORD: WHEN FIRST URGED.** When a judgment is rendered upon an insufficient verdict, all the material issues not having been passed upon and disposed of by the jury, the error may be urged for the first time in the supreme court. *Id.*
12. **SHERIFF'S SALE: MOTION TO SET ASIDE: APPEAL.** No appeal lies from the judgment of the district court on a motion to set aside a sheriff's sale, that not being, within the meaning of the statute, a final order or judgment. *Bond v. Charleen & Lunn*, 224.
13. ———: ———: ———. The final order is made on motion to confirm the sale, and when a deed is ordered to be executed. Until such order be made the whole question as to the legality of the sale is open, and it may be controverted by all proper parties. *Id.*
14. **FINDINGS OF FACT: ERROR: JUDGMENT.** Where a judge, in a cause tried to the court, fails to find on all the material issues, it is such error as will invalidate any judgment rendered therein. *Dole v. Burleigh*, 227.
15. **ERROR OF RECORD: FIRST URGED IN SUPREME COURT.** Error in rendering judgment on findings that do not dispose of all the material issues, being error of record to be ascertained from inspection, it may be first urged in the supreme court. *Id.*
16. **FORMER CONVICTION OR ACQUITTAL.** Where a defendant enters a plea of former conviction or acquittal alone, he elects to stand on such plea, and if the issue is found against him, he will not be permitted to enter a plea of not guilty, but the court must give judgment of conviction or acquittal according as the facts prove or fail to prove the former conviction or acquittal. *The People v. Briggs*, 302.



17. ———: ———. A plea of former conviction or acquittal may be pleaded either with or without the plea of not guilty, and if the defendant does not desire to stand on his plea of former conviction or acquittal, he must unite therewith his plea of not guilty. *Id.*
18. INDICTMENT: COPY TO ACCUSED: WAIVER. A person indicted under the laws of the United States for any other capital offense than treason, is entitled to the privilege of having delivered to him a copy of the indictment and list of jurors and witnesses at least two entire days before trial: *Held*, that the entry of a plea of not guilty and proceeding to trial by defendant is a waiver of the statutory privilege, and cures the objection that no copy of indictment was furnished or that the copy served was defective. *McCall v. The United States*, 320.
19. INSTRUCTIONS: ERROR: WHEN REVIEWED. Alleged error in the giving or refusing an instruction will not be reviewed by the supreme court, unless all the instructions given by the court on the same branch of the case are embraced in the record. *Cheatham v. Wilber et al.*, 335
20. ———: EXCEPTION: WHEN TAKEN. Appellate courts will not consider exceptions to instructions which were not taken at the time they were given, or at least before verdict unless further time has been given by the court *Id.*
21. VERDICT: ISSUES SETTLED. All disputed facts are determined by the jury, when they find for the plaintiff on all the issues; and their decision upon such facts should stand, unless there is insufficient evidence to warrant their finding. *Waldron v. The C. & N. W. R. R. Co.*, 351.
22. ATTACHMENT: CHARACTER OF PROCESS. The attachment, under the code, is not original process, and by it an action is not commenced, nor upon it alone can judgment be obtained. The action is commenced by summons, and the attachment is an adjunct, and can only be employed in an action already commenced. *Id.*
23. GENERAL APPEARANCE: ENTRY BY DEFENDANT: EFFECT OF. A voluntary appearance by the defendant to the suit generally, is equivalent to personal service of the summons upon him; and after such appearance the court acquires full jurisdiction for all purposes whatsoever. *Bonesteel v. Gardner et al.*, 372.
24. ———: ———: ———. If the proceedings under the writ for obtaining possession of the property were so irregular and defective that no jurisdiction could thereby be conferred, all questions in relation thereto become immaterial after defendant appears, answers and contests the case on its merits. *Id.*
25. JUSTICES COURT: APPEAL. An appeal to the district court, from the judgment of a justice of the peace, under the provision of a statute requiring the trial to "proceed in all respects, in the same manner as though the action had been originally instituted therein," excludes the consideration of any alleged errors committed by the justice, on the trial, except such as relate solely to jurisdictional questions. *Id.*
26. ———: ———. The object of an appeal from the judgment of a justice, prior to the passage of the revised codes, was to try the case on its merits, and such an appeal was not designed to perform the functions of a *certiorari*. *Id.*
27. PERSONAL PROPERTY: ACTION TO RECOVER: PROVISIONAL REMEDY. The action for the recovery of personal property, under the provisions of the code of civil procedure, is an original action, and may or may not have coupled with it the provisional remedy of claim and delivery. *Id.*
28. PROCEEDINGS: LAW AND EQUITY: DISTINCTIONS ABOLISHED. Under the provisions of the code of civil procedure, all distinction between actions at law and suits in equity, and the forms of all such actions and suits have been abolished, and a uniform course of proceeding established. *Gress v. Evans et al.*, 387.

29. **APPELLATE COURT: JURISDICTION: EFFECT OF CONSENT.** The mere consent of parties cannot confer jurisdiction, unless in a very few special instances. The appellate powers of the supreme court are fixed by law, and can be exercised only in the modes and channels prescribed by the codes. *Id.*
30. ———: **EFFECT OF STIPULATION: UNCERTIFIED EVIDENCE.** A stipulation of parties as to testimony adduced on the trial below, in the absence of a case made or exceptions settled, will not authorize the appellate court to receive and review *de novo* such uncertified evidence. *Id.*
31. **APPEAL: TRIAL TO THE COURT: CASE AND EXCEPTIONS.** Upon the trial of a cause to the court, without the interposition of a jury, either party desiring to review upon the evidence appearing upon the trial, a question of fact or of law, must make a case or exceptions, in like manner as upon a trial by a jury, except that the judge in settling the case is required to briefly specify the facts found by him and his conclusions of law. *Id.*
32. ———: ———: ———. Cause tried to the court, and the following general exceptions appended to the decision: "To which finding of facts, conclusions of law and the order of the court, the defendants except:" *Held*, that on appeal from the judgment, with no case made or exceptions settled, there was nothing before the appellate court, except such papers as the clerk was authorized to attach and file as a judgment roll, to-wit: the summons, pleadings, or copies thereof and a copy of the judgment, with the findings on the facts and conclusions of law, of the judge who determined the cause. *Id.*
33. ———: **INADVERTENCE OR NEGLECT.** Inadvertence or neglect of parties or counsel to properly prepare a case for review, is not a matter for which the appellate court has authority to provide a remedy. *Id.*
34. ———: **PREPARATION OF: CONCURRENCE OF JUDGE.** The presiding judge before whom a cause is tried is a recognized entity in making a case or in settling exceptions, and his concurrence or approbation, as a general proposition is necessary in the formulation of either the one or the other. *Id.*
35. **J EMURRER: DEFECTS IN COMPLAINT.** Upon the argument of a demurrer to an answer the defendant may attack the complaint upon the grounds that the court has no jurisdiction, or that the complaint does not state facts sufficient to constitute a cause of action. And if it appears that the objections thus raised are well taken, the defendant will be entitled to judgment, notwithstanding the defects in the answer. *Clay County v. Simonsen et al.*, 403.

See HABEAS CORPUS, 1, 2.

## PUBLIC OFFICER.

1. **OFFICER, EX-OFFICIO: BOND: LIABILITY.** The statute provided for the election of a judge of probate, fixed his bond, and further provided that he should be *ex-officio* county treasurer: *Held*, that his bond as judge of probate covered his duties as county treasurer, and that he and his sureties would be liable thereon for any breach of its conditions in the discharge of the duties of either office. *Clay County v. Simonsen et al.*, 403.
2. **DUTY TO ACCOUNT: DEMAND.** When the law makes it the duty of a public officer, in retiring from office, to account and make return to the proper authorities, and to deliver to his successor in office all public records, books, papers, and funds pertaining to his office; upon failure or refusal to do so, no demand is necessary before bringing suit. *Id.*
3. **BOND: CONDITIONS.** The bond of a judge of probate and *ex-officio* county treasurer was conditioned that "he shall well and faithfully, and impartially perform the duties and execute the office \* \* without fraud, deceit, or oppression:" *Held*, that his liability was that of an insurer, and not measured by the law of bailments, and that he was bound, not to exercise due care and diligence in the discharge of his duties, but to perform them absolutely, without conditions or exceptions, unless prevented by an irresistible superhuman cause, or by the act of a public enemy. *Id.*

4. **PUBLIC FUNDS: SAFE KEEPING: LIABILITY OF TREASURER.** The fact that a county fails to furnish a *safe*, on request of the county treasurer, is no excuse for the non-performance of his obligation. He becomes personally responsible, and in the absence of any statutory provision, must provide for the safe keeping of the funds and property coming into his hands. *Id.*

# SABBATH.

1. **INSTRUCTIONS TO JURY.** A jury that has retired to deliberate upon their verdict, may request and receive additional instructions on the Sabbath, or the judge may on that day upon his own motion have the jury brought in and reinstruct them, for the purpose of correcting a supposed error or mistake in his former charge. *The People v. Odell*, 197.

# STATUTES.

1. **REPEAL BY IMPLICATION: RULE GOVERNING.** Whether a new law, by implication, supersedes an old one upon the same subject, cannot well be determined, in most cases, by any merely *a priori* rules of argument or construction, but must depend very much upon the peculiar circumstances of each case,—the old and the new law—the mischief and the remedy. *Campbell v. Case*, 17.
2. ———: ———: ———. A subsequent statute revising the whole subject-matter of a former one, and evidently intended as a substitute for it, must operate to repeal the former, although it contains no words to that effect. *Id.*
3. **REPEAL: EFFECT.** The repeal of a repealing act revives the statute originally repealed. *The People v. Wintermute*, 63.
4. ———: ———: ———. The criminal code of 1862-3 was repealed by the act of 1868-9, which was in turn repealed by the act of 1872-3: *Held*, that the code of 1862-3 was thereby revived, and its provisions governed in all criminal proceedings. *Id.*
5. **REPEAL: BY IMPLICATION.** A subsequent statute inconsistent with or repugnant to a former one repeals it by implication; and when a reviving statute covers the whole subject-matter of antecedent statutes, it virtually repeals them without any express repealing clause. *The People v. Spensler*, 289.
6. ———: **PUNISHMENT CLAUSE.** If a new statute provides a milder punishment than was before imposed for the same offense, it repeals so much of the old law as concerns the punishment. *Id.*
7. **VALIDITY OF: CONSTRUCTION.** All statutes must be construed, if possible, so as to give them validity, force and effect. In doing this, respect must always be had to the language of the statute, the plain and obvious meaning of the words used, and the relation which one enactment bears to another, as well as their objects and purposes. *The People v. Sweetser*, 308.
8. **AMENDATORY: ———.** In construing an amendatory act, the old law, the mischief arising under it, and the remedy which the new law may be supposed to provide, should be considered. *Id.*
9. ———: ———. An amendment becomes a part of the original act, whether it be the change of a word, figure or line, or the striking out of an entire section, or striking out and inserting, or in any other way modifying or altering its provisions. *Id.*
10. ———: ———. When an amendatory act sets forth the entire sections amended, they are to be construed as introduced into the place of the repealed sections, and in view of the provisions of the original act after such introduction. *Id.*
11. ———: ———. The amendment of a statute by a subsequent one operates as to all acts done subsequently thereto as though the amendment had been a part of the original statute. *Id.*

## TAXES AND TAXATION.

1. **SALE OF REAL ESTATE: RIGHTS OF PARTIES.** The right of a party under the statute providing that "no real estate belonging to any person shall be sold for taxes while personal property belonging to such person can be found by the treasurer or collector," is a personal right, of the violation of which the taxpayer alone can complain, and of which no third party can be allowed to take advantage. *Frost et al. v. Flick* 131.

See EQUITABLE JURISDICTION, 4, 5, 6, 7, 8, 9.

## TRESPASS.

1. **TRESPASS: UNDER LEGAL PROCESS.** The suing out of legal process, and the delivery of the goods to the officer having it, is part of the same transaction, and in the eye of the law, wilfully set on foot and consummated by the party suing out the process, and he is liable to the party against whom the proceedings are instituted for the damages actually sustained. *Clark et al. v. Bates et al.*, 42.

## VENUE.

1. **VENUE: CHANGE OF: DISCRETION.** The county to which an action should be sent, on a motion for a change of venue under the statute of 1862, is in the discretion of the court; *vide* 58, § 51. *Waldron v. Evans*, 11.

## VERDICT.

1. **JUDGMENT: INVALIDITY.** In an action for the recovery of specific personal property, where the ownership is put in issue by the pleadings, the jury returned the following verdict: "We, the jury, find that the plaintiff is entitled to the possession of the property, and find its value to be \$650, and assess his damages to be \$75." *Held*, that the jury having failed to pass on all the issues, to-wit: that of ownership, no valid judgment could be entered on the verdict. *Holt v. Van Eps*, 206.
2. ———: ———. A verdict which finds but part of the issues, and says nothing as to the rest, is insufficient, because the jury have not tried the whole issue, and is not sufficient to sustain a judgment.

## WITNESSES.

1. **HUSBAND AND WIFE: CO-PLAINTIFF: COMPETENT WITNESSES.** Under the provisions of the code of civil procedure, husband and wife, when joined as co-plaintiffs or co-defendants, are competent witnesses to testify in their own behalf, and the fact that the evidence of one may incidentally benefit the other, is no valid objection. *Sanders et al. v. Reister*, 151.
2. ———: ———: ———. The rule that permits husband and wife, when joined, to testify in their own behalf, cannot be extended to authorize or permit one to testify against the other, excepted in cases provided by statute. *Id.*

## WRIT OF ERROR.

1. **WRIT OF ERROR: MOTION FOR A NEW TRIAL.** It is not necessary to lay a foundation to bring a case into this court, that a motion for a new trial should be made in the court below. *Waldron v. Evans*, 11.

















